Supreme Court, U.S.
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92-266

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

TERRY J. O'REAR,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS FOR THE FOURTH DISTRICT
and
REQUEST FOR SUMMARY REVERSAL

PETITION FOR WRIT OF CERTIORARI and REQUEST FOR SUMMARY REVERSAL

Respectfully submitted by:

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Petitioner, *pro se*

August 1992

QUESTIONS PRESENTED

1. Whether a State's 'bad faith' destruction of evidence prior to trial constitutes harmless error or whether it constitutes a fundamental denial of "due process" (as guaranteed by the 5th & 14th Amendments) when testimony regarding that destroyed evidence was the only corroborative "proof" presented by the State in support of the complaining witness' testimony in a rape trial and when, by misrepresenting that evidence as "lost but not destroyed," the state was allowed to testify as to the "nature" of that evidence despite the fact that its destruction prevented the defendant from being able to effectively analyze that evidence prior to or at the time of trial and from being able to fairly present a defense at trial?

2. Is a defendant's constitutional right (under the 6th & 14th Amendments) to effective assistance of counsel at trial and on initial appeal squelched when the prosecutor both in deed and in sworn documentation conceals the true deposition of relevant and material evidence from the defense and thereby causes defense counsel to alter his presentations and arguments?

3. Is the constitutional right to a fair trial (as guaranteed by the 5th, 6th & 14th Amendments) violated when a prosecutor makes false allegations, regarding the true disposition of material evidence in a criminal prosecution, in both a sworn affidavit and in oral testimony before the trial court, and both the trial and appeal courts rule against the defendant on the <u>very</u> basis of the State's false claims?

[Questions Presented conclude on next page]

4. Can a trial court ruling and the appellate court ruling thereon which are explicitly based upon a State prosecutor's sworn affidavit that material evidence was inadvertently "lost," continue to be upheld as "law of the case" by a later reviewing court when it is finally and conclusively established that the material evidence in question was in truth "destroyed" by the State prior to trial and the knowledge of that destruction was suppressed and kept from the initial reviewing courts by the prosecution and when the application of the 'law of the case" prevents review of serious federal questions of "due process of law"?

- -

ADDITIONAL QUESTION THAT COULD BE REVIEWED BY THIS COURT FOLLOWING A GRANT OF CERTIORARI:

a. Whether the uncorroborated testimony of a woman alone is enough to sustain a conviction for rape, when the prosecution effectively withholds useful medical evidence and testimony that if presented would tend to discredit the woman's claim of rape - especially when there is no other corroborative proof of the allegations? And, when a prosecutor thus fails to present a fair and accurate picture of the case to the jury, is a defendant's federal constitutional and civil rights to "due process" and a "fair trial" violated? (particularly when this occurs in a community where the 'color of the local political climate' had been recently painted with allegations of 'male brutality' toward women, 'male bias' in the courts & in the prosecution of sex crimes, and city-wide street demonstrations led to the successful recall of a sitting judge alleged to have been guilty of such biases).

LIST OF PARTIES

All the parties to the proceedings below are listed in the caption,
with the Respondent being represented by:

- at the Wisconsin discretionary reviewing court (or high court or State supreme court) and currently before This Court by:

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No. ----------

IN THE

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OCTOBER TERM, 1992

TERRY J. O'REAR,

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u

STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS FOR THE FOURTH DISTRICT

and REQUEST FOR SUMMARY REVERSAL

The petitioner, TERRY J. O'REAR, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Wisconsin State court of appeals for the fourth district entered in this action on March 19, 1992. (Discretionary review by the state court of last resort was denied on 05-11-92).

OPINIONS BELOW

The Opinion & decision entered March 19, 1992 and rendered by the Wisconsin court of appeals for the 4th District (affirming the Order of the circuit court for Dane county, Branch 2), and its accompanying dissenting Opinion, is reprinted and attached as Appendix A, 1-14a, *infra*; it is unreported. The Order denying discretionary review by the supreme court of Wisconsin entered May 11, 1992, is reprinted and attached hereto as App. B: 15a; it is not reported.

The preliminary supplemental briefing Order of the Wisc. 4th Dist. court of appeals entered 12-26-91 was unreported & is reprinted as App C: 16a.

The Order & Opinion of the state circuit court Branch 2 (Torphy, J.) for Dane County, granting a motion to quash the grant *of Coram Nobis* were rendered 03-21-91 and 02-21-91 respectively, are unreported & attached as App. D & E: 17-20a. The Order of the state circuit court Br 6 (Boll, J., the original trial judge) for Dane County granting a *Writ of Error Coram Nobis* (based on prosecutorial destruction & suppression of evidence), rendered

12-20-89, is unreported & reprinted as App F: 21a.

Prior to the current state *Coram Nobis* round of proceedings, Petitioner had an initial round of state appellate hearings regarding his criminal conviction. There, the final Opinion & decision entered 12-13-82 was rendered by the Wisconsin 4th Dist. court of appeals; it is reprinted & attached as App G: 22-35a; it was unreported. The Order denying discretionary review, entered 03-09-83, is reprinted & attached hereto as App H: 36a; it was not reported.

The formal Order entered 04-21-82 denying motions for a new trial, rendered by state circuit court Branch 6 (Judge Boll) for Dane County, reprinted & attached hereto as App. I: 37a, was unreported. The corresponding conclusions of law & findings of fact, orally given and transcribed on 11-16-81, rendered by Boll, J., which relate to the current proceedings are found *infra* in App J: 41-44a, 51-54a, & 56a.[1]

JURISDICTION

The Opinion of the court of appeals, District IV, of Wisconsin was entered on March 19, 1992 (*infra*; App. A, pp. 1-14a). It is final by its terms.

Under the laws of Wisconsin a petition for reconsideration to a court of appeals is not permitted. (Wis Stats., § 809.24). Review by the Wisconsin court of last resort is "a matter of judicial discretion, not of right." (Wis. Stats., § 809.62). A petition for review, timely filed, with the Wisconsin court of last resort was denied in the instant case on May 11, 1992 (*infra*; App. B: 15a). The Wisc. court of last resort "does not reconsider its decision on petitions for review." (Wis. Sup. Ct., *Int. Oper Proc.* ('91), § II-J).

This petition is being docketed in This Court

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[1]From 08-14-85 to 02-22-88, Petitioner, *pro se*, was engaged in proceedings before the federal court system via 28 U.S.C. § 2254 (habeas corpus) regarding the original conviction that underlies the current proceedings. Petitioner was denied standing to proceed for the sole reason that he was considered not to be "in custody" under § 2254 as he had been released from parole (App Q: 68a). Thus the federal court system has not considered Petitioner's original conviction or the issues presented today. These federal proceedings have been reprinted & attached here as appendices at App. K-R: 57-70a; all are unreported save the denial of cert. by This Court at 484 U.S. 1078, **O'Rear v. Att'y Gen'l.**

within 90 days of the denial of discretionary review by the Wisc. court of last resort, as per Rule 13.1.

The federal question was raised as indicated at pp. 4-7, *infra*. The excerpts from the record showing the raising of the federal question are set out in the Appendix at the pages indicated at pp. 4-6, *infra*.

The jurisdiction of This Court to review the judgment of the Wisc. Court of Appeals, Dist. IV is invoked under the provisions of 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

The Constitutional Provisions involved are: the Due Process and Equal protection clauses of the 5th and 14th Amendments; and the confrontation, compulsory process and assistance of counsel clauses of the 6th Amendment as extended to the States via the 14th Amendment. (As per Rule 14.1(f) the relevant portions are reprinted *infra*, at App. S, p. 71a). The statutory provisions involved are Title 28 § 1257(a) and 1651(a) of the U.S. Code which grant This Court the authority to properly review and act upon this Petition for Certiorari. (The relevant portions are reprinted in App. S, p. 72a, *infra*).

STATEMENT OF THE CASE

I. Raising the Federal Question:

The federal questions sought to be reviewed here have been raised in the state courts below since the earliest stage of the original appellate process as well as throughout the current *Coram Nobis* proceedings. Documentation regarding the raising of the federal question below has been reprinted and (together with a short review guide to these reprints) is attached hereto in the appendices, as per Rule 14.1(h).

At the (trial) Court of the first instance:

In Your Petitioner's request for post-conviction relief from the initial trial court, he noted that his claims were "explicitly based on due process [a]s controlled by federal constitutional law," on "fairness of the trial" as established by rulings of This Court and on "the Sixth Amendment to the Constitution." (Please see App. T: 73-4a, *infra*, for a brief narrative guide to the records attached hereto as App. U & V).

The trial court took up the question in its

conclusions of law and findings of fact, on 11-16-81, with direct reference to "The United States Supreme Court," the case law of This Court & "the constitutional framework of whether an item of evidence has been 'suppressed' by its destruction." (R76:112; App. J: 52a, *infra*).[2] After distinguishing this case from federal & state 'destruction' cases, the court ruled: considering. . . the fact that the prosecution indicates that it lost the [evidence] in good faith, but didn't destroy it, that the Court should not grant a new trial on this ground (R76:115; App. J: 53a - emphasis added). [3]

At the initial appellate level : In the documentation presented to the state appellate court, Petitioner's attorneys pointed out that state case law on "rules of disclosure" and "suppression of evidence" was based upon rulings of This Court wherein the federal constitutional guarantees were established. The Respondent likewise presented counter arguments wherein the federal claim of "due process" and the rulings of This Court were discussed (See App. T: 75-6a for a brief guide to how this was raised in App X, Y & Z)

As both sides presented the federal question, the issue was clearly before the appeals court, which also indicated it was considering the federal question of "due process" when it stated: "prosecutorial suppression of exculpatory evidence violates due process regardless of the prosecution's good faith. Brady v. Maryland, 373 U.S. 83, 87 (1963)..." (**State v. O'Rear**, No. 82-809-CR, slip op, p. 6, 12-13-82, reprinted at App. G: 26a). (See App. T: 76a *infra*, for a brief one paragraph guide to App. G & W).

Basing its ruling on the Respondent's false representations that the evidence was not 'destroyed,' the appeals court dismissed the federal "due process" claim regarding that evidence.

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[2]As used below, citations to the original trial court record use the letter R for Record & the no. by which the written record is designated, followed by a colon & the page #. If reprinted here, the specific Appendix letter is given, followed by a colon & the page #.

[3]See App. T: 74-5a for a guide to the trial court review (App J) & to the Wisc. case there cited in reference to This Court (i.e., **State v. Amundson**, 230 NW2d 775 (1975); reprinted at App W: 90-3, *infra*)

Because the Respondent suppressed the fact that, in truth, they had affirmatively "destroyed" the evidence at issue four months prior to trial and kept that fact from the court of the first instant and the appellate court, those courts were unable to properly review or pass upon the federal question in 1981-83.

At the (trial) court of the first instant via Coram Nobis: In the documentation presented to the original trial court in support of Petitioner's 'Petition for a Writ of Error *Coram Nobis*' (App. AA & BB, *infra*) the federal question of due process of law, as established by This Court's interpretation of the 5th, 6th & 14th Amendments, played a dominant role in successfully establishing that the *Writ* be issued by the original trial judge. (App F). However, following the unexpected resignation of the original trial judge, a new replacement judge, granted the Respondent's Motion to Quash the *Writ*, citing no case law, or statutory or other legal basis, despite the fact that the federal question was clearly before him. (See App. T: 77-8a for a guide to the records attached at App AA, BB, EE, FF, D, E & F).

At the appellate level via Coram Nobis: Petitioner's contentions regarding the Respondent's violations of his federal constitutional "due process" and "fair trial" rights as established by rulings of This Court formed the basis of his state appeal. (See App. T: 78-9a in re: App GG, HH, II, A & B).

The fact that the federal question was before the Wisc. appeals court is readily apparent in the dissenting opinion. There, Justice Sundby reviews the court's first (1982) consideration of Petitioner's conviction, pointing out that then the court considered **Amundson** (*supra*, & see at App. W) as based upon This Court's rulings in "**Brady** and its progeny."(*infra* App A: 8-9a). Justice Sundby then goes on (at App A: 9-11a) to show how his call for a new trial for Petitioner is in harmony with This Court's rulings in **Youngblood** (*infra;* App. CC) and **Trombetta** (*infra;* App. DD). Sundby concludes by stating: "the state exhibited constitutional bad faith when it destroyed that evidence so that it was not available to the defendant." (*infra*, App A: 11a). The Majority

Opinion (affirming Torphy's Order granting the Motion to Quash the *Writ*), did not address the federal question, rather the majority (of 1) declined to review O'Rear's claims, ruling that the court's decision in 1982 was "Law of the Case" and current consideration was inappropriate. (*Infra.*; App A: 1-5a, *passim*).

Conclusion: Law of the Case Doctrine is Not a Bar to Consideration by This Court - Jurisdiction is Sustained: The fact remains abundantly clear, however, that the federal question was presented to and considered by the Wisconsin court in the 1982 case, which the current appellate court claims to be the "Law of the Case." Therefore, under the rulings of This Court: the substantial federal questions of due process & fair trial, remain viable; jurisdiction continues to be attached; and it is proper for This Court to consider this petition. As noted in 1982 in **Hathorn v. Lovorn** (457 U.S. 255, 261-2):

> It has long been established, however, that '[w]e have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of [state proceedings],...and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case....' **Reece v. Georgia**, 350 U.S. 85, 87 (1955).

II. UNDERLYING FACTS OF THE CASE:

A. Prologue: On January 8, 1980, Terry J. O'Rear was arrested for a sexual assault alleged to have occurred on the morning of January 2, 1980. While no physical or eye-witness evidence was ever discovered or presented at trial corroborating the allegations of rape, and while the results of the medical exam (showing no signs of any assault, which tended to contradict the woman's story of a prolonged sexual attack) was kept from the jury, the complainant's allegation that Mr. O'Rear told her "he had to see if he was man enough to rape a woman" was widely broadcast and appeared in the front and editorial pages of the local papers. This extremely "politically incorrect" statement, made the conviction of O'Rear an urgent priority for the D.A.'s office. For this was the widely acknowledged "politically correct"

community of Madison, Wisconsin, where, in the previous year, a judge had been recalled due to "insensitivity" toward women, and the County D.A., James E. Doyle, Jr. (having been elected with the support of groups opposed to "male bias" in the Court) unsurprisingly made the apprehension and conviction of 'sex criminals' the number one priority of his administration. This "man enough" statement also became the motivating factor behind the 6 year prison sentence of a first time offender. (R75:148; App JJ: 162a; R72:62-3, App KK:175-6a)

Following a preliminary hearing on 01-28-80, Mr. O'Rear was bound over for trial. On 02-29-80, O'Rear's trial attorney filed two discovery documents (R13; App LL: 181-2a & R14; App MM: 183-4a). The latter, specifically based upon the "5th, 6th & 14th Amendments" & upon rulings of This Court.

B. Trial: After a two-day trial before a jury (Case no. 80-CF-14), O'Rear was convicted of one count of 2nd degree sexual assault (Wis. Stats. § 940.255-2-a) & one count of False Imprisonment (Wis Stats § 940.30). The complainant, Nina Tuman, accused O'Rear of a long & painful rape. (R71:23-5; App NN: 190a). While admitting to attending a private party and to giving her a ride home, both at her suggestion (R72: 66 & 78; App. KK: 180a), O'Rear denied having any sexual involvement or contact with Tuman and he denied having been at the alleged crime scene (R73: 30). Tuman alleged that the crime occurred between 4:20 - 5:30 a.m. on Jan. 2, 1980 in the parking lot of a rural bar (R71: 42-3). O'Rear & his roommate both said he was home at this time (R72: 49 & 81). As the Wisc. appeals court noted in 1982:[4]

> No independent witness saw the assault or even saw the parties where the assault was said to occur. No evidence was produced of physical injuries to complainant, such as bruises, abrasions or torn tissue. No conclusive scientific tests were performed. The jury's verdict turned on the jurors' assessment of

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[4] **State v. O'Rear**, No. 82-809-CR, slip. op., p. 13, Wis. Ct. App., 12-13-82; App. G, p. 32a. Hereafter referred to as: **O'Rear I** - (App. G).

the credibility of complainant [&] defendant. And, as was noted in 1992 by Justice Sundby: "In our 1982 decision...[w]e noted the lack of any physical evidence other than the cigarette butt placing O'Rear at the scene of the alleged crime..."[5] Justice Sundby then continued:

> Immediately after the alleged assault, the complainant told no one of the assault, although she had an opportunity to do so. [R71: 48-9] Instead, she showered and went to bed. [R71:29, 50 & 58-9] She did not report the incident to the police until eight to nine hours after the alleged assault. [R71:49 & 69] Hair samples were obtained from O'Rear but the state claimed that the samples were unsuitable for scientific analysis. [R72:11 & 6-10, *passim*]
>
> The complainant testified that at the time of the assault, her vagina was "very tight, very dry," and that O'Rear kept "ramming" her for about five minutes before penetrating her after which he continued to "ram" her. [R71:25 & 44; App NN: 190a] However, a next-day medical examination revealed no lacerations or bruises, her genitalia were normal and there were no anal lesions. [R61, Exb. C [6]] The state listed the doctor who conducted the examination of the complainant and his assisting nurse as witnesses, [R61, Exb E; App OO: 212a] and the prosecutor privately told the court and defense counsel at the end of the first day of trial that he would call both witnesses before he rested. [R71:127-128; App NN: 131-2a]. However, he did not call either witness or present the medical report.
>
> The crime lab expert testified that the lab results of traces of semen [R72:15; App KK, 163a] could not link such semen to O'Rear

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[5] **O'Rear v. State**, No. 91-0832, slip.op., Dissent, p. 7;Wis.Ct. App 03-19-92; App A. p. 12a. Hereafter, listed as: **O'Rear II** -(App. A).

[6] Due to Rule 33.1(c), the handwritten med rpt [R61, Exb C] can't be attached to today's Petition; it was supplied to the **O'Rear II** court as App. p. 106 to Petitioner's 1991 Brief & it was attached to O'Rear's *Coram* Petition as Exb. 3. It can thus be obtained below.

[R72:20; App KK 164a] and that it was possible that these traces resulted from consensual sexual intercourse that the complainant engaged in the previous evening. [R72:19; R73:121]. **O'Rear II**, dissent, p. 7-8; App A: 12-13a.

The trial, boiled down to a "classic credibility battle." Tuman said O'Rear was guilty of a gross rape. O'Rear said he didn't rape & wasn't at the crime scene. While the jury found O'Rear guilty, we also know that the jury had problems with Tuman's credibility. We know this especially because during their deliberations the jury asked the judge one question and it concerned 'rush' (R61, par. 10; *infra*, App. OO: 211a). Given a) the structure of the question, & b) the fact that while the defense witnesses claimed the drug "rush" was owned & used by Tuman, Tuman denied having or using "rush," but later admitted to possessing a 'substance' [R71:36-7; App NN: 192-3a] that would create a "16 second rush" like "amyl nitrate" [R71:54; App NN: 194a]; hence, it is easy to see the jury was questioning her credibility.[7]

With the above facts in mind, let us turn to the central issue of today's Petition. O'Rear claimed he was never at the 'scene of the crime.' The prose-

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[7]The issue of credibility also played out on the events that occurred prior to the alleged rape & involved supportive witnesses on both sides. The issues involved: 1) the time the party ended : 4:00 or 3:00 a.m. - the latter allows O'Rear to be home before 4:00,as confirmed by his roommate; 2) whether marijuana was used and/or a marijuana smoking pipe (or "bong") was openly present in the middle of the party or not; 3) whether Tuman used &/or possessed the drug "rush" (the 'street name' for butyl nitrate) or a harmless "room odorizer"; 4) whether Tuman was inebriated and violent toward others at the party, inflicting injury on another woman & precipitating the end of the party, or whether she only had "one puff" of pot, a "little" beer, & "accidently" threw a bottle hitting the woman in the face. The changing & conflicting versions of these issues by the prosecution witnesses both at trial & prior to trial also underline the credibility problems the State had. Please refer to the following Appendix pages where the witness conflict is shown: I: For the State: a) at App. NN: 1) Tuman: 187-9a & 191-4a; 2) Reynolds: 202-3a; 3)Schultz: 204-7a; & b) at App. KK - Murray: 165-7a; & II. For Defense: at App KK: 1) Dect. Watson: 170-1a; 2)Castillo: 172-4a; & 3) O'Rear: 177-80a .

cution presented 'evidence' that defeated that claim. As presented to the jury a unique piece of evidence that could be linked to O'Rear was found exactly by a "pile of tires" in the bar's parking lot where the rape was said to have occurred by policewoman O'Donohue (R71:61; App NN: 196a). That evidence was a "handrolled cigarette butt." Tuman testified that O'Rear smoked handrolled cigarettes "that night." (R71:13) Officer Dreifke testified that Tuman told him that the suspect "rolled his own cigarettes" at the scene of the crime. (R71:71; App NN: 200a) O'Donohue testified, in uniform, that at the bequest of Dreifke she went to the crime scene and found a hand-rolled cigarette butt at the exact location by the tire pile. (R71:61-2; App NN: 196-7a) The prosecutor had Officer Kretschman testify that when he arrested O'Rear at his home, O'Rear took with him tobacco & rolling papers for smoking cigarettes. (R71:83; App NN: 201a) The prosecutor solicited from O'Rear's roommate (Mr. Castillo) the fact that O'Rear rolls his own cigarettes from a pouch. (R72: 53; App KK: 174a) O'Rear admitted under cross-exam that he was rolling his own cigarettes on the evening in question. (R73:29; App PP: 213a) As the trial judge recalled, the defense counsel unsuccessfully objected to the prosecutor's discussion of the cigarette butt in his unreported closing remarks before the jury.(R76:94-5; App J: 41-2a)

However, the cigarette butt, unlike every other piece of physical evidence spoken of before the jury, was never entered into evidence. And, it was only in response to cross-examination, that Officer O'Donohue stated she did not know where it was or what became of it. When asked if anybody else looked for it, she failed to respond. She also evaded a question in regard to her checking with Mr. Antoine prior to taking the stand (see R71: 61-2; App NN: 196-7a) The trial defense attorney filed an oral motion to keep the presentation of O'Donohue's oral evidence from the jury. The trial judge denied his motion.(R72:30-1; App KK:168-9a).

C. Appeal: The judge's ruling on this motion became a major issue in O'Rear's post-conviction

proceedings before the trial court. On the day of the hearing the prosecuting attorney, Asst. D.A. Antoine, submitted a sworn affidavit wherein he affirmed: "(8)... that the District Attorney's Office was unaware of the loss of the cigarette butt... until [the officer] admitted its loss upon the witness stand." (R67; App QQ: 215a). Following oral presentations (App J, pp. 38-47), the trial judge after, specifically discussing and differentiating 'destroyed' evidence cases from the case before him (R76:111-4; App J, pp. 51-2a), denied the motion for a new trial in large part because "the prosecution indicates that it lost the cigarette in good faith but didn't destroy it." (R76:115; App J, p. 53a).

Later, after the trial judge ruled on both the specific instance of the cigarette butt (quoted above) and the combined grouping of claimed errors (R76:116), the Asst. D.A. revised his affidavit, saying he wanted to get everything right and didn't want to "worry" about "any error in my affidavit"(App J: 55a) before the case went on to the appellate level (App J: 56a). Antoine revised his affidavit by saying he would have first known of the loss "just before" his witness took the stand, "not" while "on the stand," as he goes over "all evidence with every witness." (R76: 127-8; App J, p. 55-6a). The trial court ruled that Antoine's revision of his affidavit in this matter did "not change the result." (R76:128; App J, p. 56a).

Following the ruling of the trial judge, the 'affirmed' "lost" evidence became the major issue of discussion before the appellate court. O'Rear's attorneys and the Court accepted Antoine's affidavit as truth. (See App RR & SS [par. 3 & 4]: 217 & 220a). The Respondent, specifically differentiated federal case law from O'Rear's case on the very basis that the evidence in question was 'lost' and not 'destroyed' and that since it was lost in "good faith," no claim of suppression or of error could be found. (App Z: 100a) As they have sworn in their own affidavits, due to Antoine's sworn statements, O'Rear's attorneys argued the more difficult standard to be applied to 'lost' evidence cases rather than the standard to

be applied in 'destroyed' evidence cases. (*Infra*, App RR par 5 & App SS, par. 5, at 217a & 220a).

While the appellate court noted that the trial court "said that the prosecution introduced evidence regarding the cigarette butt to 'bolster' the state's case [R76:113]" [**O'Rear I**, 4-5; App G: 25a], when the appeals court ruled on the cigarette butt issue they concluded that since the evidence had been "lost" and not "destroyed" and since O'Rear could not meet the harder "lost evidence" standard of proving the evidence to be exculpatory, reversal was unnecessary. [**O'Rear I** at 6-7; App G:26-7; see also **O'Rear II** - dissent, p. 3; App A: 8a.]

Two months after the denial of discretionary review, O'Rear was released early from prison on 'earned' parole and eventually filed a federal habeas corpus suit (dismissed for lack of standing) wherein he continued to argue the standard regarding 'lost' evidence. (See App TT: 222-5a re said filing & App UU: 226-7a for a list of his questions). The Respondent did not correct him. Roughly 2 months after the denial of cert. by This Court, O'Rear went back to his former appellate attorney (Cates) asking for his help in locating the trial evidence so that DNA tests could be run on them and thereby establish his innocence via such new science. (App R: 217-8a). *D. Coram*: It was in this manner the investigator discovered that the cigarette butt ("link-to-the-crime-scene") evidence had never been 'lost' nor was it simply "missing." Rather, the butt had been destroyed 4 months prior to trial. (App VV, at par 5; p. 229a; & See exact size copy of evidence tag indicating destruction at App WW: 231-2a). It was also learned from the property & evidence officer that the destruction would not have occurred unless it was ordered to be destroyed prior to trial. (App VV, par 7 & 8; pp. 229-30a).

Subsequently, O'Rear's attorney filed a Petition for a Writ of Error *Coram Nobis* (App AA) with the original trial judge (Boll, J.); who, granted the *Writ* to Petitioner on 12-20-89. (App F). On 01-22-90, after the *Writ* was granted, the Respondent filed a "Return" to the Petition (App XX) & simultaneously

filed a "Motion to Quash" the *Writ* (App YY). On 01-26-90, Judge Boll unexpectedly announced his resignation from the bench. O'Rear's attorney then filed a motion for an expedited hearing before Judge Boll (App ZZ). The District Attorney (Foust) formally agreed. (App AAA). No such hearing was held.

Hence, the case was reassigned to a replacement (Judge Torphy). In Nov. 1990 briefs were filed on the "motion to quash" and on 12-05-90, Judge Torphy held an initial hearing and then one week later held another formal hearing on Respondent's Motion to Quash the Writ of Error *Coram Nobis*. At the Hearing of 12-12-90, D. A. Foust, dropped all save ground # 3 of his original "motion to quash"[i.e., "the error complained of would not have prevented the entry of judgment." (App FF: 142-3a)]. At this hearing, D.A. Foust also affirmed that the cigarette butt evidence had been destroyed and not lost.[8] Also, documentary evidence was introduced as Exhibit 1 and read orally to the court without objection (12-12-90 Transcript, p. 18; App FF: 146a). Therein, D.A. Foust had written that Antoine informed him that he, Antoine, learned that the cigarette was "not to be found" while in "his office" "before Deputy O'Donohue testified" in the court-room. Antoine, now, for the first time, "recalls sending someone down to get the cigarette butt" and was again informed that "it could not be found." (12-06-90 letter of Foust; reprinted at App BBB)

Following this hearing, Judge Torphy then issued his Decision (App E) & Order (App D) granting said Motion to Quash. Therein, without citing any case law, statute, or legal standard for his ruling and in avoiding any discussion of the impact of the oral testimony & link to the 'crime-scene' upon the actual 1982 jury, Torphy, J. found, despite the destruction & suppression, that "a judgment could have been entered" without reference to the 'butt.'

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[8]Foust to the Court: "...[T]here was a destruction of the item of evidence, and I think that error complained of is the destruction of that evidence, and that clearly is outside the record of the trial..." Official 12-12-90 Hearing transcript, p. 3; at *infra*, App FF: 143a.

O'Rear then, as of right, appealed to the Dist IV appeals court. In a split verdict (2:1), the majority (of new members) applied "Law of the Case" & refused to review O'Rear's merits (App A, pp. 1-5a). In dissent and based upon the rulings of This Court, Justice Sundby found that the State had violated O'Rear's constitutional rights in bad faith and that a new trial should be ordered. (*Infra*, App. A; 6-14a).

REASONS FOR GRANTING THE WRIT

Unresolved areas need clarification for Courts below:

This Court first 'squarely addressed' "the government's duty" of evidence preservation in criminal cases, in **Calif v. Trombetta**, 467 US 479, 486 (1984) and has returned to it only once since, in **Arizona v. Youngblood**, 488 US 51(1988). In **Youngblood** both the concurring (at 59-61) and dissenting (at 61-74) opinions indicated that unresolved issues remained.

In **Youngblood** (at 58), This Court held that this 'area of constitutionally guaranteed access to evidence' was confined to: "that class of cases...in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."

Certain questions on and examples of what type of conduct constitutes 'bad faith' were not expounded upon. Additionally, courts below are admitting they are having to scrutinize the "facts and language" of **Youngblood** in order to be "persuaded" what This Court's 'intentions' actually were (See e.g., **U.S. v. Belcher**, 762 F.Supp 666, 672 (W.D.Va. 1991).

Another area arises from the above quotation, as the phrase "police" was exclusively used. The Court did not use the terms State, government, prosecution, or prosecutor's office as it did elsewhere in its opinion and as did Justice Stevens' concurrence. Was it This Court's intention that 'bad faith' can only be determined by police actions (i.e., uniformed members of a police department) or by the actions of the police team (i.e. - which would include members of the prosecution)? Courts below have already

begun interchanging "government" for "police" (E.g., **U.S. v. Stevens**, 935 F2d 1380, 1388 (3rd Cir. 1991). Also, what of actions taken after the 'destruction,' such as hiding the fact of the destruction from all other parties, including the Courts? May such actions be considered in establishing 'bad faith'? Taking on these and other such questions that have caused debate and conflict below would assist in the effective and orderly administration of justice & help guide the courts below as they try to divine the meaning & intention of This Court.

Ability/Need for Continued Doctrinal Development:

Granting review here would allow continued doctrinal development via a third impression of "the area of constitutionally guaranteed access to evidence." **U.S. v. Valen.-Bernal**, 458 US 858, 867. The opportunity to address this need 'squarely' is particularly available here due to the circumstances of this case, which are not so unique they will not continue to arise again, if not often, in America.

For here the evidence destroyed was done neither in accordance with normal, standard procedures (as in **Killian** & **Trombetta** & as noted by Justice Sundby in dissent; App A: 10-11a) nor via inadvertent spoliation (as in **Youngblood**). Here the evidence destroyed was not secondary evidence (e.g., 'notes' as in **Killian** or 'breath' rather than 'test results' as in **Trombetta**) rather it was 'real' physical evidence for which there was no comparable alternative. And, especially, unlike in **Youngblood**: a) the State concealed the destruction from both the defense and the courts; b) the State made use of the materials, over objection, in its "case in chief" before the jury; c) the State misled the trial (jury) court and falsely affirmed in documents before both the post-conviction and appeal courts that the evidence was 'lost' when, in truth, the evidence was destroyed by the police 4 months prior to trial and it is clear from the record that the courts below affirmed Petitioner's conviction in 1981-2 largely because of the State's false affirmations that the evidence was "lost but not destroyed" [see pp.4-5, & 11-12 *supra*, & App J: 52a [R76:115] & App G: 25a]; & d) given

the State's suppression of the fact of their destruction of evidence, no curative jury instruction was given. Moreover, the material significance and exculpatory value of the evidence was clear prior to its destruction. Lastly, constitutional 'Bad faith' on the part of the State is alleged, and has been found by the only jurist who has reviewed the entire record and has applied the principles laid down by This Court for evaluation of a destruction situation such as this: namely, Sundby, J., in dissent (App A: 11a).[9]

This case also allows This Court to directly address a prosecutor's misconduct in light of that conduct's impact upon the constitutional right to effective assistance of counsel at first appeal (i.e., to expand upon or reassess **Evitts v. Lucey** 469 U.S. 387, 396-7 & **McCoy v. Ct. of App- Wisc.** 486 US 429, 435; et all.

Importance; Application to Doctrine; & Error Below

A. The State made significant use of the destroyed evidence at trial: Instead of the typical supportive evidence that is currently used in rape trials, here no medical testimony was introduced and the scientific test results were inconclusive (see above Facts, p. 7-8 citing from the Courts below). Instead, the prime corroboration for the rape allegation came from the link-to-the-scene evidence established by the oral testimony of Officer O'Donohue regarding a hand-rolled cigarette butt found at the exact location of the crime. This admission was prejudicial to the defense and constitutionally improper. As noted by Justice Sundby in **O'Rear II:** "It is undisputed that the cigarette butt is the only physical evidence placing O'Rear at the scene of the alleged crime." (App A: 12a). And, as the **O'Rear I** Court noted below: "It is undisputed that the defendant smokes cigarettes which he rolls by hand." (App G: 23a).

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[9] **State v. Amundson** [230 NW2d 775 (1975; App W: 90-3a] based upon This Court's rulings in **Killian**, 368 US 231 & **U.S. v Augenblick**, 393 US 348, was used as the basis for the appeals court 's review of lost evidence in **O'Rear I** in 1982. The Court majority below did not review the destruction of evidence in **O'Rear II** (see pp. 27-29, *infra*) . Only in Justice Sundby's dissent do you find an evaluation of this case in terms of This Court's rulings in **Youngblood & Trombetta** (App A: 10-11a) .

In reference to the rest of the trial, the cigarette butt testimony was clearly 'material' & 'relevant" evidence in increasing the probability of the rape in the mind of the jury. (See: 29 Am Jur 2d Evidence § 252) The testimony was offered by the State for two significant reasons: to establish a probative link between Mr. O'Rear and the 'crime scene' (so as to persuade the jury that the allegations of a rape in the parking lot were more likely to have occurred as the complainant said they did); and to rebut O'Rear's claim that he was never in the parking lot, discrediting his overall credibility, while enhancing Tuman's.

The presentation of the policewoman's testimony regarding the finding of a unique 'handrolled' butt that could be shown as an item of "personal property..such as [O'Rear] would likely have upon his person"[10] was a direct attack upon O'Rear's trial defense strategy, which was composed of 2 themes: 1) O'Rear denied the rape & being at the crime scene, saying he was home at the time of the alleged rape, which his roommate confirmed (*supra*, Facts: p.7) 2) the defense claimed O'Rear was a truthful person while Tuman's credibility was questionable.[11] Credibility was the major issue at trial. **O'Rear I**: "The jury's verdict turned on ...credibility of complainant and defendant." (See Facts pp. 7-9 & n. 7, *supra*). This was a close case; and both the trial and appellate courts made note that the cigarette butt was introduced to "bolster" the State's case [cites at Facts *supra*, p. 12). As noted by the Nevada high court, in rape trials "great reliance must be placed on the testimony of the complainant and...the defendant. Thus, the presence or absence of other evidence which would support or refute the testimony of the involved parties has the potential for great significance." **State v. Havas**, 601 P2d 1197,

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[10] Quote from 29 Am Jur 2d Evidence § 251; see fnt 24 below

[11] O'Rear called 3 witnesses to testify to his general credibility (R73: 83-117,*passim*) & O'Rear called a private detective (Watson), to testify as to the unreliability of the testimony of the complainant & her friends, & as to Ms. Tuman's behavior earlier on the evening in question as it related to her use of 'drugs,' her intoxication and her violent reactions to others (R72:31-5 App KK:169-71a)

1198 (Nev.1979). Especially in the midst of a emotionally laden rape trial where "prejudice [reaches] its loftiest peak."[12] An accurate presentation of evidence would have: a) precluded O'Donohue's testimony (or cast doubt on the police officers' testimony), b) provided no attack on O'Rear's defense and no support of the complainant's story, c) hurt the credibility of the State's entire case, & d) increased the issue of 'reasonable doubt' in the mind of the jury. What was improperly presented creates a 'reasonable probability' of acquittal without it.[13]

Indeed, the prosecutor used the cigarette butt link-to-the-scene line throughout his presentation (cites *supra* at Facts, p. 10). As Justice Sundby noted in **O'Rear II:** "The record shows that the state questioned five witnesses - three police officers, O'Rear's roommate, and O'Rear himself -- as to O'Rear's habit of smoking handrolled cigarettes and as to the existence of the cigarette butt at the scene of the alleged crime." (App A: 7a) Indeed, 'the butt' as presented before the lay jury was not 'insignificant' evidence but 'relevant' evidence in establishing that the crime of rape occurred. The only purpose that uniformed Officer O'Donohue was called as the 2nd State witness was to tell the jury about being instructed to go to the crime scene and of finding the butt exactly where the rape was said to have occurred. (App NN: 195-9a). To deny the accused evidence of the butt's true destruction [clearly relevant and material to his ability to fairly and effectively cross-examine O'Donohue] was to deny him access to his 6th Amendment right of fair confrontation, compulsory process & effective assistance of counsel.[14]

B. Comparable Evidence was Unobtainable: Given that the butt was represented as lost, O'Donohue's testimony became unrebuttable. Since this was a physical item of 'real evidence' connecting the

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[12] **State v. Tarrell**, 247 NW2d 696, 701, n. 1 (1976)-quoting Slough & Knightly, 41 **Iowa L. Rev.**, 325, 333-4 (1956).

[13] Compare: **U.S. ex r Smith v. Fairman**, 769 F2d 386 (7CA '85).

[14] **Jencks v. U.S.**, 353 US 657; **U.S. v. Nobles**, 422 US 237, 249; **Taylor v. Illinois**, 484 US 400,408-9; **Washington v. Texas**, 388 U.S. 14; **Pointer v. Texas**, 380 US 400.

accused to the scene of the crime [3 Wharton's Criminal Evidence (13th Ed) § 635], it was important for the jury to be able to physically view the item to actually determine if it was hand-rolled, as the officer testified, or machine rolled and if it was similar to the imported European tobacco that O'Rear smoked.[15] Unlike the destroyed evidence in **Trombetta, Killian** and **Augenblick**, here the evidence was not "secondary evidence," nor was it destroyed as in **Trombetta,** in the process of a scientific test, nor, as in **Youngblood,** via 'inadvertent spoliation.' And here, the evidence was "ordered destroyed" and not in accordance with "normal practice." (See Sundby's dissent at App A: 7 & 11a). Petitioner had no way of effectively disputing the credibility of the police officer's testimony.[16] As Justice Sundby noted in dissent "Cross-examination of O'Donohue was not a satisfactory alternative to examination of the cigarette butt itself." (App A: 12a). O'Rear had no other comparable evidence to prove the negative that the unavailable butt was not his and that he was not therefore at the crime scene. Indeed, the State here did not simply find the evidence, they heightened its evidentiary significance to the jury throughout their presentation (cites at Facts *supra*, p. 10). Had the State not presented O'Donohue's testimony & used it throughout their case, the constitutional requirement to disclose the truth of the destruction would not have come into play. Compare: **U.S. v. Nobles**, 422 U.S. 237, 239, n. 15.

C. Concealment & Misleading the Courts.: It is well established that a prosecutor is presumed to know

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[15] As noted in 29 Am Jur 2d Evidence § 771: "Whenever it is necessary to show the condition or quality of a certain article or substance, the thing itself is the most powerful evidence that can be produced ... Things may be exhibited to jurors in order that they may obtain clearer views and be able to reach sounder conclusions, and this course is viewed as more effective than a description by the witnesses."

[16] As noted in **U.S. v. Belcher**, *supra*,762 F.Supp at 673 "Law enforcement officials are not infallible..." Indeed, O'Donohue would [as noted by the Fed Cir Court, in similar circumstances ,in **U.S. v Harrison**, 524 F2d 421, 432] be "the most unlikely source" of admission of an "error on the stand."

about all evidence both he & the police possess and it is his duty to disclose police actions surrounding that evidence, including its destruction as he is the "spokesman for the Government."(**Giglio v. U.S.**, 405 US 150, 1540 "[A] prosecutor's office cannot get around **Brady** by keeping itself in ignorance... about... aspects of a case."[17] Here the prosecutor allowed O'Donohue to testify that the evidence was 'missing' which led the Court into allowing her testimony to go to the jury, over objection. (Facts, *supra*, p. 10).

We now know from the D.A.'s office's admission in 1990 that the evidence was destroyed (App. FF: 143a, & see ftnt 8, *supra*); that the prosecutor knew that the cigarette butt could not be produced prior to calling Officer O'Donohue to the stand (App BBB: 240a); that Antoine met with O'Donohue in his office prior to his presence in the Courtroom (*Id*); that after she told him it could not be produced, he then sent another party to get it from the evidence room and was told it could not be found (*Id*). We also know from the property & evidence officer that the 'butt' was "ordered" to be destroyed on Aug. 21 1980, four months prior to trail. (App VV: 229-30a). We also know that the property tag clearly indicated it was destroyed (see copy at App WW: 232-3a) and any officer who went to the evidence room would have seen that tag & noted the butt was destroyed on the day of trial. The prosecutor knew that O'Donohue's testimony was misleading & factually incorrect and he did nothing to correct it for the Court. This on its own was a clear violation of due process.[18] Had the Asst. D.A. informed the Court either prior to or during O'Donohue's testimony that the evidence was in truth destroyed then: a) proper consideration could have been taken by the Trial Court [Compare **Griffin v. U.S.** 183 F2d 990, 993 (Fed Cir. 1950)]; b) objections to her testimony based on 'irrelevancy' could have been made [Compare **State v. Wilson**, 507 N.E.2d, 1109, 1110, n.2 (Ohio 1987)]; c) the jury

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[17] **U.S. ex rel. Smith v. Fairman**, 769 F2d 386, 392 (CA7 1985), quoting **Carey v. Duckworth**, 738 F2d 875, 878 (7th Cir.1984);

[18] **Napue v. Ill**, 360 US 264 , 271(1959) ; **Giglio v. U.S.**, 405 US 150, 153-4; **Giles v. Md**, 386 U.S. 66, 73-76 ; & ABA Stands § 5.6b.

could have avoided having this "drop of ink" affect the integrity of their "glass of milk"/verdict & a fair trial could have been had. But, by being truthful in this close case, with no supportive evidence besides the 'butt,' and the complainant's credibility under attack, the State might lose, & it needed this "bolstering" tactical advantage in a case that had become 'locally politically important' to the elected D.A.

When the State closed its case, the trial defense lawyer filed an oral motion before the Court asking that O'Donohue's testimony be stricken, the Court denied it, and again the D.A. did not tell the Court the true disposition of the 'butt' even though its "high value to the defense could not have escaped...[the prosecutor's] attention." **State v. Wynce**, 518 A2d 907,910, citing **U.S. v. Keogh**, 391 F2d 138, 146-7 (2nd Cir. 1968). But telling the truth at this point would have allowed: a) the Court to consider the ramifications of the destruction and perhaps grant the Defense's motion; b) the defense would have requested and undoubtedly received a curative jury instruction, such as that used in **Youngblood**,(488 US at 59-60), so as to prevent any infection from O'Donohue's testimony; and c) a fair trial could have been had. But, in a 'game of fox and hounds' your pursuit is conviction, so you remain silent, despite your duty oath as a prosecutor and despite the ABA standards[19].

D. More Concealment & Bad Faith. But the D.A.'s duty to disclose is, as This Court ruled, "ongoing" [**Pennsylvania v. Ritchie**, 480 US 39, 60] and prior to the postconviction hearing the importance of the disposition of the cigarette butt was highlighted to the State in the motions & briefs of the Petitioner. Such that Mr. Antoine filed an affidavit with the Court (copy at App QQ: 214-5a) in which he swore [at par. 8] that the butt was 'lost' and that he was unaware of its 'loss' prior to the presentation of said loss in Court. Both of these facts were false. And, given his admissions of 1990, we can justifiably

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[19] A.B.A. Standards for Criminal Justice ...Relating to the Prosecution Function § 1.1

assume he knew them to be false. Later, after the trial court had first formally denied Petitioner's motion for a new trial based on O'Donohue's testimony on the butt on the very grounds that the state said that it was "lost in good faith but not destroyed," Antoine amended his affidavit & said that he was aware of the 'loss' just prior to calling his witness on the stand. [cites at Facts, *supra*, p. 11 & 13]. He did not disclose that he met with the witness in his office, sent another person after it and, most importantly, he did not disclose that the evidence was in fact destroyed. Again the ABA Standards of prosecutorial conduct were violated. See **Imbler v. Pachtman**, 424 US 409, 427, n. 25 re ABA Stand. § 3.11. In the context of this case, and the trial court's ruling, this was decidedly perpetrating a 'fraud upon the Court' and interfering with the Petitioner's 6th Amendment right to a fair appeal. [20]

In concealing the destruction to the Court, the State then was able to argue to the appeals court that O'Rear's case could be differentiated from the case law concerning 'destroyed' evidence and that since the butt was 'lost' the State urged the Court to deny O'Rear's appeal. Indeed the State turned their failure to disclose the fact of the destruction into an advantage in their presentation to the appeals court stating that defendant had "failed to meet" the "burden on this appeal of demonstrating...against the great weight and clear preponderance of the evidence" that the trial court's finding that the "state lost the cigarette in 'good faith'" was incorrect. [App Z: 100a]. However, that finding, as the record indicates, was based on the State prosecutor's incomplete, misleading, & false affidavit, and, the State had in its sole possession the 'evidence tag' indicating that the evidence was not "lost in good faith," but instead was destroyed in bad faith, and the State continued to conceal it from the Courts. O'Rear's appellate attorney's have filed affidavits [see Facts, *supra*, at p. 12] outlining how the State's misrepre-

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[20] **Evitts v. Lucy**, 469 US at 393-6 & see **McCoy v. Ct. of App. of Wis.**, 486 US 438, 436: "Neither...counsel may deliberately mislead the Court with respect to...the facts..."

sentations interfered with their ability to assist O'Rear's constitutional right under the 6th Amendment to adequate, effective counsel before the post-conviction trial court and upon appeal. **Evitts v. Lucey**, *supra*, & **McMann v. Richardson**, 397 US 759, 771, n. 14. Here the rules of the adversary process were not followed. **Taylor v. Illinois**, 484 US at 411. The State also kept the truth of the destruction from Petitioner during his attempts at state discretionary review and, later, federal habeas review. At every step of the journey here any attorney employed by the State who truly took the ABA Standards to heart could have come forward; but, no one chose the honorable course. Instead, at "each juncture" the State frustrated O'Rear's efforts to seek justice. [Compare: **U.S. Bryant**, 439 F2d 642, 646 (Fed.Cir. 1971)] Hence, the State caused the judgment to stand as it was "founded on a partial ... presentation of the facts." **U.S. v. Nixon**, 418 US 683, 709.

In the end, O'Rear discovered the truth by accident. Had O'Rear not quixotically sought assistance in having DNA tests done, the truth of the destruction would never have been revealed to the Courts. Following the grant of *Coram Nobis* by the original trial judge, O'Rear attempted in vain to present his case before a replacement judge. That judge (Torphy) inquired neither into the State's behavior (e.g., their silence, destruction, or misrepresentations) nor into the impact of the 'thing done wrong' upon the trier of fact - a lay jury (i.e., into the "likelihood that it could have affected the judgment") as the rulings of This Court demand. The record also reveals that before Judge Torphy the State was clearly knowledgeable that it was not meeting the standard to which the State is held in destruction cases.[21] And, so "the game" has continued.

Now, if the D.A.'s behavior & silence during &

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21 DA Foust at the Hearing of 12-12-90: "[Under] **Amundson** [based on **Augenblick**, 393 US 348]...if the prosecution has destroyed evidence...the burden [is] on the State to come in and explain what happened to it [i.e., the destroyed evidence]. [But] [n]ow that explanation of what happened to it I don't think is appropriate today on a motion to quash." (App FF: 152-3a).

after verdict does not establish "bad faith" or meet the standard of those "classes of cases where the interests of justice indicate that the evidence could form a basis for exonerating the defendant," then surely this case is one of those cases that Stevens, J. referred to at the end in his concurrence in **Youngblood** (at 60-1): one "involving a closer question as to guilt or innocence," where "the State acted in bad faith" making the "trial fundamentally unfair."

E. Significant/Exculpatory Value Apparent before Destruction: The police were knowledgeable, on August 21, 1980, when they destroyed this evidence (App WW, evid. tag), that this piece of evidence would "play a significant role" in either the suspect's defense or prosecution. The medical exam was available to the police and the prosecution in Jan.1980 (1 year prior to trial).[22] It reported no indication or corroboration of assault. (**O'Rear II**; App A: 12a) There was no other scientific evidence of rape: the crime lab results released to the police in May 1980 (R72:18) were inconclusive. (see Facts, *supra*, pp. 7-8) There were no other eye-witnesses. (**O'Rear I**; App G, 32a) The 'suspect vehicle' was impounded (R72:57-8) and released; testing was negative for corroborative proof (R71:82 & 85). The defendant openly denied his presence at the scene of the crime. And his roommate, who had been interviewed by the police (R71:82), confirmed that Mr. O'Rear was home at the time of the alleged assault. (R72:49). The police on 01-03-80 went to the scene of the crime and found one piece of evidence that they would use at trial to link O'Rear to the crime scene in the eyes of the jury. (App NN: 195-201a) They tagged that piece of evidence, marked it "HOLD" and placed it on a designated shelf for safekeeping in the evidence room. On Jan. 8 O'Rear was arrested and was noted by the police to possess the same type of substance found at the crime scene. (R71: 83). Certainly, the police were aware of the material significance of the evidence it had found,

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[22] The jury in this case never saw the medical report (see **O'Rear II**, App A 12-3a) and it was not released to the defense until the first day of trial, just prior to jury selection .

tagged & marked "Hold." Every policeman knows that a link to the scene of the crime is an extremely important, if not a necessary, item in a criminal prosecution, particularly if the accused has an 'alibi' type witness.[23] One way to link a criminal to the crime scene is via a piece of his personal property which he was known to possess at the time.[24] Indeed by August 1980, when the butt was destroyed, it was clear to the police that the "butt"/ link-to-the-crime-scene was the only corroborative piece of evidence to the female's allegations of rape. Moreover, this was a case of selective destruction. None of the other 12 items of physical evidence testified to at trial and stored in the evidence room on the same "designated shelf" were destroyed.[25] By the time of destruction in August the crime lab report on those items was back in police hands and it indicated no confirmation of the assault. Had the evidence been 'inculpatory,' as presented at trial, why would the State destroy it, unless it was other than what they claimed?

Given its destruction, we must engage in the speculative "task of divining" (**Trombetta** at 486). However, 'the fact' that the evidence was exculpatory [of the requisite proof of the defendant's presence at the scene of the crime] can now be assumed by the following established legal inferences: A) the fact of destruction itself leads to the inference that the item destroyed was other than what the destroying party claimed it to be at trial (i.e., since the State at trial claimed it to be incul-

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[23] E.g., 29 Am Jur 2d Evidence § 150: "[T]he fact and place of perpetration are both ingredients of the crime and must be proved by the prosecution..." and at § 151 "the state's evidence necessarily must show his presence at the precise place..."

[24] As noted in 29 Am Jur 2d Evidence § 251: "Evidence of the defendant's presence near the scene of the crime...*items of personal property belonging to the accused, such as he would likely have upon his person, are found* at or near *the scene of the crime* ..such fact may be *shown* as tending *to connect the defendant with the crime as its guilty agent.*" (emphasis added).

[25] These items noted as all stored with the same case number on the same "designated shelf," are listed as Trial Exb 4-14 at R71:68 & 74-77) - None provided any link to Mr. O'Rear (R72:20).

patory on the matter of proof of presence at the crime scene, had it not been destroyed it could easily be shown not to be linked to O'Rear & the link to the crime scene would have evaporated)[26]; B) the fact that the prosecution withheld their destruction of this evidence from the defendant, his attorneys and the Court system for 10 years leads to the inference that it was other than what the State claimed it to be at trial [27]; C) After first using the evidence persuasively before the jury and misleading the Courts as to its actual destruction, while falsely claiming it was 'lost,' they went on to claim that it was not relevant evidence anyway and doubted it could have been O'Rear's [Antoine at postconviction at R76: 104-5; App J: 45-6a); State on appeal to the **O'Rear I** Court: in their brief at App. Z: 100-01a.] As noted by the high Court of Ohio in similar circumstances: "Far from seeking to correct this misconception [at trial], the prosecution sought to exploit it." **State v. Wilson**, 507 N.E.2d 1109, 1111 (Ohio 1987) If it was either clearly irrelevant ("not logically tending to prove any material fact") or exculpatory (of O'Rear's presence at the crime scene) after verdict, surely this underlines why a 'bad faith' actor would destroy it prior to trial: As if it was physically presented you would not be allowed to introduce it on the grounds of irrelevancy; but when the testimony alone was presented it was far from being exculpatory or irrelevant in nature, rather it was devastating to the defense, and the act of the "bad faith" destruction allowed that devastation. Here the jury was not instructed on the difference between 'irrelevant,' 'exculpatory,' or 'inculpatory' evidence. Had the Jury not listened to O'Donohue,

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[26] See 1 Wharton's Criminal Evidence (13th Ed., 1972) § 146, par. 2; 29 Am Jur 2d Evidence § 177 at p. 220-1; 12 Fed Proc, L.Ed, Evidence, § 33:552 :"inconsistent or incredible testimony...suspicious circumstances surround the...destruction..give rise to an inference of bad faith"; **State v. Wright**, 87 Wash.2d 783, 557 P.2d 1,7 (1976).

[27] As this Court has clearly stated: "Silence then becomes evidence of the most convincing character." **Interstate Circuit v. U.S.**, 306 US 208, 226 & the 6 cases there noted; 29 Am Jur 2d Evidence § 178, at p. 221-3; 1 Wharton's Criminal Evidence (13th Ed., 1972) § 145.

the difference between 'irrelevant' and 'exculpatory' evidence would have been meaningless, as they would not have heard of the 'link to the crime scene' at all. And, without that 'link,' and in relation to the rest of the trial and the lack of any other substantiating or corroborating evidence of the woman's allegations of assault, the verdict becomes, as Justice Sundby found, constitutionally untenable.

F. The Verdict is Constitutionally Unsound:

Therefore in evaluating the alleged error "in relation to everything else the jury considered" [**Yates v. Evatt**, No. 89-7691 500 US ___, 111 S.Ct. 1884, 1893], Petitioner contends that "confidence in the outcome" (**U.S. v. Bagley**, 473 US 667, 682) is undermined, and without the butt's 'crime scene link' made via O'Dohohue's improper testimony in 1981 "the factfinder would have a reasonable doubt respecting guilt" (**Strickland v. Washington**, 466 U.S. 668, 695). Moreover, there was additional constitutional error in the suppression of the destruction of evidence by the State: it prevented the courts from properly addessing the testimonial/destruction error in 1981-83 & it prevented fair counsel for O'Rear.

The State Court below used 'law of the case' as a devise to avoid review of the federal question:

The Wisc. appeals court majority held that petitioner's *coram nobis* claim was governed by the "law of the case" 'Doctrine' (hereafter '*The Doctrine*'). The court specifically disregarded O'Rear's contentions that '*The Doctrine*' should not apply when "the factual circumstances have substantially changed since our initial decision." (App A: 4-5a). In stark contrast, Justice Sundby, in dissent, after reviewing how the court's emphasis in **O'Rear I** was on 'lost' evidence in contrast to "evidence which had been destroyed by the police," and how the legal standards for review are different in "an evidence *destruction* case," (App A: 7-9a), found: "Therefore our earlier decision in **State v. O'Rear** is inapposite. This difference disposes of the state's claim that we are bound by the "law-of-the-case" of our 1982 decision." (**O'Rear II**, dissent, p. 5; App A: 9a)

Justice Sundby's conclusion that '*The Doctrine*' is inapplicable to the current case should be upheld. The majority opinion below is at variance with the preponderance of law in the U.S.A., and should be overruled. It would be improper to allow the court below to get by with a ruling so at odds with the established case law that insulates this case, and possibly future cases, from further review.

1st) The ruling below is directly at odds with the interpretations of This Court. In 1979 in reaffirming **In re Sanford Fork & Tool Co.**, 160 U.S. 247(1895), This Court stated: "The doctrine of the law of the case comes into play only with respect to issues previously determined." **Quern v. Jordan**, 440 U.S. 332, 347, n. 18 - emphasis added.

In **O'Rear I**, the appeals court framed the issue it was then discussing thusly: "Was it reversible error not to strike testimony regarding physical evidence lost by the state before trial?" (App G: 23a). That is not the issue that was presented to the court of appeals in **O'Rear II**, thus *The Doctrine* is inapplicable.

Let us review what was not "previously determined" by the court below in **O'Rear I:** 1)the evidence in question had in truth been 'destroyed' by the State prior to trial and was not 'lost'; 2)the D. A'.s office misrepresented the 'link to the crime scene' evidence as 'lost' when they, or their agents, had, in truth, 'destroyed' that evidence; 3) given 1) & 2), the State was engaged in "suppression" of material facts from first the jury and then the trial & appellate Courts; 4) the standards of law & review are different when considering 'destroyed' vs. 'lost' evidence & when considering 'bad faith' vs. 'good faith'; and 5) what affect the improper conduct of the prosecution had upon the judicial process & what sanction, if any, should be applied.

2nd) The majority interpretation below is at odds with the established interpretation of '*The Doctrine*' by the preponderance of other state high courts.[28]

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[28] Some but not all of such State high court rulings are: Mich.: **Mitchell v. Reolds Farm Co.**, 261 Mich 615, 247 NW 89, 90(1933); Minn.: **Cayse v. Foley Brothers, Inc.** 110 NW2d 201, 204 (1961); N. Dak: **City of Minot v. Freelander**, 368 NW2d 514, 518 [cont'd][

Federal Appellate Courts[29] & standard legal reference texts.[30] As noted by the high court of Virginia: "[When] since the first appeal the facts have materially changed.... [s]uch a change of conditions makes inapplicable the doctrine of the law of the case."[31]; and as also noted by the Federal Cir. Court of Appeals: "The law of the case doctrine is not applicable to issues neither presented nor decided in a former proceeding in the case." **Stearns v. Beckman Inst. Inc.**, 737 F2d 1565 (Fed Cir 1984). with direct reference to IB MOORE'S FEDERAL PRACTICE ¶ 0.404[1] (2d ed. 1983).

Thus, given the preponderance of the case law, the majority interpretation below in the instant case can be considered to be so "certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question." **Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.**, 243 US 157, 164.

CONCLUSION

The Wisc. appeals court, via improper usage of *'The Doctrine'* has insulated this case both from review and public awareness of serious violations of due process by the highest prosecutorial official in the State of Wisconsin. What is needed, as Justice Kennedy stated in **U.S. v. Loud Hawk**, 628 F.2d 1139, 1151 (9th Cir.1979): "... is to avoid the impairment of judicial integrity that would occur if the prose-

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[fint 28 cont'd] (1985); Calif: **Hoffman v. Southern Pac. Co.**, 215 Cal 454, 11 P2d 387, 388 (1932),citing **Allen v. Bryant**, 155 Cal. 256, 100 P. 704. (1909); Missouri: **Bird v. Sellers**, 122 Mo 23, 26 SW 668 (1894) & **Murphy v. Barron** 286 Mo 390, 228 S.W. 492 (1921); Arkansas: **Ark.State Highway Comm. v. Lemley**, 497 SW2d 680, 681(1973); & Mississippi: **Continental Turp. & Rosin Co. v. Gulf Naval Stores Co.**, 142 So.2d 200 (1962).

[29] **Hayman Cash Reg. Co. v. Sarokin**, 669 F.2d 162, 169(3CA; 1982), quoting **U.S. v. Wheeler**, 256 F2d 745,748, (3CA,1958); **White v. Murtha**, 377 F2d 428,431-2 (5th Cir.1967); **Handi Invest. Co. v. Mobil Oil Corp**, 653 F2d 391, 392 (9th Cir. 1981); **Comm.v. Netcher** 143 F2d 484, 486, cert. den'd 323 US 759 (1944).

[30] Some being: 5 Am. Jur. 2d Appeal & Error § 748-9 & 755; 87 ALR2d 342; 67 ALR 1393; 30A Am Jr. Judgements, § 331 & 985.

[31] **Virg. Public Serv. Co. v. Steindler**, 187 SE 353, 355 (1936).

cution were allowed to manipulate court processes, and protective rulings or sanctions may be required both to insure a fair trial in a specific case and to deter future violations." Hence, in the spirit of **Illinois v. Krull**, 480 U.S. 340, & **Mapp v. Ohio**, 367 U.S. 643, 650-3, This Court needs to invoke a sanction and make a statement in order to prevent such misconduct from continuing unabated in Wisconsin, for now the same 'politically correct' D.A., who oversaw the instant case, sits as the Attorney General charged with the protection of the rights of all citizens in Wisconsin, not just those he 'protected' in Dane County in 1980. While he may well be sensitized to the past injustices done to female 'victims' during rape trials, he needs to be reminded that 2 wrongs do not make a right. As This Court said in **Giles v. Maryland**, supra, at 99: "[O]ur total lack of sympathy for the kind of physical assault which is involved here may not lead us to condone state suppression of information which might be useful to the defense." Even more so where, as Justice Sundby noted, there was no supportive evidence of assault.

THEREFORE, for all the above reasons stated and implied, Petitioner respectfully prays that either the petition for a writ of certiorari be granted, or alternatively, because the error of the court majority below is so clear in refusing to review the federal question, that This Court, in its wisdom, summarily reverse the decision of the appeals court majority below and affirm Justice Sundby's dissent.

Respectfully submitted,

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Madison, WI
53715

August 1992

Petitioner, *pro se*

Case No. _____

U.S. Supreme Court, October Term, 1992

TERRY J. O'REAR v. STATE OF WISCONSIN

APPENDIX

TO

and bound with

PETITION FOR WRIT OF CERTIORARI and REQUEST FOR SUMMARY REVERSAL

submitted by:

TERRY J. O'REAR

Petitioner, *pro se*

August 1992

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B (p. 15a)	Order Denying Discretionary Review, Supreme Court of Wisconsin, 05-11-92.
C (p. 16a)	Preliminary Order re: supplemental briefing, Wisconsin Ct. App., Dist. IV, 12-26-91.
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F (p. 21a)	Order Granting A *Writ of Error Coram Nobis*, Dane County Circuit Court, Branch 6 (Judge Boll, the original trial judge), 12-20-89.
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P P (p. 213a)	Excerpts from the Official Transcript of the Jury Trial - Case No. 80-CF-14, held before Dane County Cir. Court, Branch 6, (Judge Boll), 01-7-81, p.m., [day 2] [Exb #7 to Coram Petition,i.e. - App. AA]. [numbered in the original proceeding as R-73): - Cross Examination of O'Rear: p. 29
Q Q (p. 214-215a)	Affidavit of D.L. Antoine, Trial Prosecutor filed in Opposition to Postconviction Relief Attempt, presented to Dane County Circuit Court, Branch 6, 11-16-81, [Exb #4 to Coram Petition, i.e.- App. AA].
R R (p. 216-218a)	Affidavit of Richard L. Cates: Petitioner's Supervising Appellate Counsel in 1981-83, presented to Dane County Circuit Court, Branch 6, 10-23-89, [Exb #33 to Coram Petition, i.e.- App. AA].
S S (p. 219-221a)	Affidavit of James W. Gardner: Petitioner's Appellate Counsel in 1981-83, presented to Dane County Circuit Court, Branch 6, 10-23-89, [Exb #34 to Coram Petition, i.e.- App. AA].
T T (p. 222-5a)	Excerpts from Petitioner's "Statement of the Case" relating to his habeas filing, originally presented to the Federal District Court for the W.D. of Wisc. on 12-31-86. [Appendix Index page vii]

UU (p. 226-7a)	Excerpts from the list of allegations of error in state conviction presented to the Fed. Dist Ct. for the W.D. of Wis. on 12-31-86 & as listed for This Court on 01-09-88 as App. J. to petitioner's prior petition for a writ of certiorari to the US 7th Cir.
VV (p. 228-230a)	Affidavit of Edward G. Grosse: Private Investigator who discovered that evidence was destroyed, presented to Dane County Circuit Court, Branch 6, 10-23-89, [Exb #31 to Coram Petition, i.e.- App. AA].
WW (p. 231-232a)	Non-reduced/exact size Photocopy of Official Dane County Sheriff's Property evidence tag marked "Destroy-8/21/80", presented to Dane County Circuit Court, Branch 6, 10-23-89, [Exb #32 to Coram Petition, i.e.- App. AA].
XX (p. 233-4a)	Respondent's Return to Petition for Writ of Error Coram Nobis, presented to Dane County Circuit Court, Branch 6, 01-21-89.
YY (p. 235)	Respondent's Motion to Quash the Writ of Error Coram Nobis, filed 01-21-89.
Z Z (p. 236-8a)	Petitioner's Motion for Expedited Hearing filed with original trial judge, 01-28-90.
AAA (p. 239a)	Respondent's agreement to request for Expedited Hearing, letter to Judge, dated 01-31-90.

BBB (p. 240a) Letter of District Attorney Foust, dated 12-06-90, introduced as documentary evidence at the Oral Argument Hearing of 12-12-90 before Cane County Cir. Court, Br. 2, Torphy, J. presiding, as documentary exhibit 1 (read into record see today's App. FF, p. 146a) & also presented as App. 146 to Petitioner's Appendix to appeal brief of 06-21-91 before the Wisc. Ct of Appeals, Dist IV, Case no. 91-0832.

CCC (p. 241-2a) Excerpts from the official transcript of the Motion Hearing held before Judge Michael Torphy, Dane County Circuit Ct, Br. 2, 12-05-90; Statement of Court to Petitioner's Attorney: pp. 25-6.

APPENDIX A

[Decision Below, Wisc. Court of Appeals, Dist. IV]
[March 19, 1992]
[Final Decision affirming Order quashing Writ of Error *Coram Nobis*]
[a/k/a for today's Petition for Cert.: **O'Rear II**]

COURT OF APPEALS DECISION DATED AND RELEASED March 19, 1992
FILED MAR 19 1992 CLERK OF COURT OF APPEALS OF WISCONSIN

No. 91-0832

STATE OF WISCONSIN IN COURT OF APPEALS DISTRICT IV

TERRY J. O'REAR,
Petitioner-Appellant,
v.
STATE OF WISCONSIN,
Respondent-Respondent.

APPEAL from an order of the circuit court for Dane county:
MICHAEL B. TORPHY, JR., Judge. Affirmed.

Before Eich, C.J., Sundby and Brown, JJ.

EICH, C.J. Terry O'Rear appeals from an order quashing his writ of error *coram nobis*. The issue is whether the trial court abused its discretion in quashing the writ. We conclude that it did not and affirm the order.

[*Majority Opinion* --page 2]

O'Rear was convicted of second-degree sexual assault and false imprisonment over a decade ago. At trial, he denied having been at the crime scene. The only physical evidence linking him to the scene was a hand-rolled cigarette butt found by a police officer. O'Rear smoked hand-rolled cigarettes. Although tests were never run to determine whether the butt was O'Rear's, the officer who found the butt testified about finding it at trial. The state never introduced the butt in evidence, however, claiming that it had been lost.

O'Rear appealed the initial conviction claiming, among other things, that we should grant a new trial under sec. 752.35, Stats., because admission of the "cigarette butt" testimony caused justice to miscarry. We rejected the argument. *See* ***State v. O'Rear***, No. 82-809-CR, slip op. at 13-14 (Wis. Ct. App. Dec. 13, 1982).

After he had completed his sentence and exhausted all possible remedies on the initial appeal, O'Rear claims that he first learned that the cigarette butt had been destroyed. Arguing that the state either knew or should have known about its destruction, he sought a writ of error *coram nobis*. The writ was issued by the judge who heard the initial trial. After the state filed its return, a judge newly-assigned to the case quashed the writ. We affirm that order.

We review the trial court's decision to quash a writ of error *coram nobis* for abuse of discretion. *See* ***Milkulovsky v. State***, 54 Wis.2d 699, 722, 196

[*Majority Opinion* --page 3]

N.W.2d 748, 760 (1972). The trial court's exercise of discretion will be sustained if it is based on the facts appearing in the record and the appropriate

law and is the product of a rational mental process. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

A writ of error *coram nobis* is a remedy available to one wrongfully convicted of a crime because of an error of fact, outside the court record and unknown to the court, which would have prevented entry of judgment against the accused had the true facts been known. ***Jessen v. State***, 95 Wis.2d 207, 213-14, 290 N.W.2d 685, 688 (1980). The writ allows correction of the factual error, ***State v. Kanieski***, 30 Wis.2d 573, 576, 141 N.W.2d 196, 198 (1966); and, because relief is appropriate where "knowledge of (the error's) existence at the time of trial would have prevented the entry of judgment," ***Jessen***, 95 Wis.2d at 213-14, 290 N.W.2d at 688, reversal will follow.

The crux of O'Rear's argument is that had the "cigarette butt" evidence not been admitted he would not have been convicted because the credibility of the state's chief witness -- the complainant -- was "severely compromised." We disagree.

In the former appeal we stated:

[*Majority Opinion* --page 4]

> Defendant asserts...that if...testimony regarding the cigarette butt had been omitted, the credibility of his assertion that he was never [at the crime scene] would not have been damaged. We are unconvinced that the [cigarette butt] testimony...was as damaging as the defendant claims.... We cannot ignore the conclusion of the judge who heard the case that [the] evidence could have had little weight with the jury. *It is not probable a different result would probably occur in a trial which omits reference to the cigarette butt....* ***O'Rear***, slip op. at 14 [emphasis added].

A cardinal rule of appellate practice is that "a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." ***Univest Corp. v. Gen. Split Corp.***, 148 Wis.2d 29, 38, 435 N.W.2d 234, 238 (1989); ***State v. Brady***, 130 Wis.2d 443, 447, 388 N.W.2d 151, 153 (1986). O'Rear acknowledges the rule, but claims that it is inapplicable here.

First, he argues that doctrine is not applicable because our earlier opinion did not involve resolution of a question of law, but only a review of whether the trial court properly exercised its discretion in allowing the testimony, and it should not conclude his argument on this appeal. Again, we disagree.

One of the issues raised by O'Rear on the first appeal (as he does again here) was that he was entitled to a new trial in the interest of justice under sec. 752.35, Stats., on grounds that justice probably has miscarried. We may not grant a new trial on those grounds unless we can "determin[e] to a substantial degree of

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[*Majority Opinion* --page 5]

probability that a different result [is] likely to be produced on retrial." ***State v. Wyss***, 124 Wis.2d 681, 741, 370 N.W.2d 745, 773 (1985), *overruled on other grounds*, 155 Wis.2d 493, 451 N.W.2d 752 (1990). Addressing O'Rear's argument, and noting the rule just stated, we concluded (as indicated above) that "[i]t is not probable a different result would...occur in a trial which omits reference to the cigarette butt." That ruling was "plainly germane" to the issues raised on that appeal and thus was not *dictum*. ***State v. Kruse***, 101 Wis.2d 387, 392, 305 N.W.2d 85, 88 (1981).

Second, O'Rear contends that "an exception" to the law of the case doctrine applies because the

factual circumstances have substantially changed since our initial decision. The only authority cited for this proposition is ***Brady***, 130 Wis.2d at 448, 388 N.W.2d at 154. But ***Brady*** does not hold, as O'Rear asserts, that the law of the case rule "can never be applied" where the facts have changed since the court's first decision. The ***Brady*** court said only that "[t]o conclude that a ... court has the authority, in some circumstances, to reconsider ... does not compel the conclusion that the ...court must reconsider ...[b]ecause the law of the case is a question of court practice, ... not an inexorable rule." *Id.*

Finally, O'Rear argues that we should not apply the law of the case doctrine because "an inequitable result might obtain." While we note that the rule may be disregarded "when 'cogent, substantial and proper reasons exist,'" he has not persuaded us that such reasons exist here.

By the Court. -- Order affirmed.

[*Majority Opinion* --page 6]

Not recommended for publication in the official reports.

[**DISSENTING OPINION** TO:
Decision Below, Wisc. Court of Appeals, Dist. IV - 03-19-92 - Final Decision affirming Order quashing Writ of Error *Coram Nobis*]

[Page 1]

No. 91-0832(D)

SUNDBY, J. (***dissenting***). This appeal presents several important questions: Must the trial court apply a different analysis to the admission of testimony as to destroyed evidence than the analysis it applies to lost evidence? Where the state represents at trial that material evidence has been lost when it knew or should have known that the state had destroyed the evidence, is the defendant entitled to a new trial? Was the admission in this case of testimony upon the state's untrue representation that evidence to which the testimony related was lost rather than destroyed harmless error?

I conclude that testimony as to material evidence may be admitted if such evidence was inadvertently lost, or "destroyed" because used up in a testing process, unless the defendant shows that the state acted in bad faith. However, if the state destroys evidence material to the defendant's defense, except where used up in good faith testing, testimony as to such evidence may not be admitted at trial; the defendant need not show that the evidence was exculpatory. I further conclude that the admission of testimony as to material evidence which the state destroyed entitles the defendant to a new trial at which testimony as to such evidence shall be excluded unless the admission of such testimony was harmless error. Finally, I conclude that the admission of the cigarette-butt testimony in this case was not harmless.

On January 8, 1981, the defendant, Terry J. O'Rear, was convicted of second-degree sexual assault and false imprisonment. The complainant alleged that

the assault occurred in the parking lot of a local tavern. The complainant informed the police that, while parked in the parking lot, O'Rear smoked at least one hand-rolled cigarette. Therefore, approximately twenty hours after the alleged assault, the investigating officer directed a deputy to go to the scene of the alleged crime and search for such a cigarette butt. Officer O'Donohue testified that she found such a cigarette butt and placed it in the evidence room, marked with a property tag. It is undisputed that the cigarette butt is the only physical evidence placing O'Rear at the scene of the alleged crime. The record shows that the state questioned five witnesses -- three police officers, O'Rear's roommate, and O'Rear himself -- as to O'Rear's habit of smoking hand-rolled cigarettes and as to the existence of the cigarette butt at the scene of the alleged crime.

At trial, the state represented that the cigarette butt had been lost. In fact, as the property tag subsequently discovered shows, the cigarette butt had been destroyed by the property room officer four and one-half months prior to trial. The property room officer, whose initials appeared on the property tag, stated that such an item would have been destroyed prior to trial only if someone decided that it had no value as evidence or that it would not be used as evidence in the case.

At trial, the trial court denied O'Rear's motion to strike all testimony concerning the cigarette butt. The trial court also denied O'Rear's motion for a new trial concluding that the weight which the jury may have given to the cigarette butt

[*Dissenting Opinion* --page 3]

evidence would have to be "minuscule." The court also stated, "Considering ... that the prosecution indicates that it lost the cigarette in good faith, but didn't destroy it ... the Court should not grant a new trial on this ground."

In an unpublished opinion, we affirmed O'Rear's conviction. ***State v. O'Rear***, No. 82-809-CR, slip op. (Wis. Ct. App. Dec. 13, 1982). We rejected O'Rear's reliance on ***State v. Amundson***, 69 Wis.2d 554, 230 N.W.2d 775 (1975), because that case dealt with evidence which had been destroyed by the police, rather than lost evidence. ***O'Rear***, unpublished slip. op at 6. We also concluded that it was impossible for the missing evidence to have been exculpatory. ***Id.*** at 7. We concluded that where evidence is lost, the burden is on the defendant to establish that the missing evidence is exculpatory. I conclude that the test is different when the missing evidence has been destroyed by the state.

"The rule is well recognized that *suppression* by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or innocence, irrespective of the good faith or bad faith of the prosecution." ***Amundson***, 69 Wis.2d at 577, 230 N.W.2d at 787 (emphasis in original). It is undisputed that O'Rear requested all evidence in the state's possession. The inability of the defendant to show that the destroyed evidence was exculpatory does not alone defeat his or her claim that its destruction and

[*Dissenting Opinion* --page 4]

nondisclosure by the prosecution denied the defendant due process if the evidence is "clearly material to the issue of guilt or innocence." **Id.** at

578, 230 N.W.2d at 788.

In view of the state's reliance upon the cigarette-butt evidence, I conclude that that evidence was clearly material to O'Rear's guilt or innocence. What then will defeat O'Rear's claim that the state's destruction and nondisclosure of material evidence denied him due process of law? According to the ***Amundson*** court, the good or bad faith of the prosecutor is a factor to be considered within the constitutional framework of whether an item of evidence has been "suppressed" by its destruction. 69 Wis.2d at 579, 230 N.W.2d at 788-89.

As ***Amundson*** holds, the prosecutor does not act in good faith if he or she does not disclose all evidence in the possession of the state's investigatory agencies of which the prosecution has knowledge or, by the exercise of due diligence, should have discovered. ***Id.*** at 579, 230 N.W.2d at 789. The reason for the rule in an evidence *destruction* case is explained in the ***Amundson*** court's discussion of ***United States v. Bryant,*** 439 F.2d 642, 648 (D.C. Cir. 1971). The ***Bryant*** court stated: "Were ***Brady*** and its progeny applicable only when the exact content of the non-disclosed materials was known, the disclosure duty would be an empty promise, easily circumvented by suppression of evidence by means of destruction rather than mere failure to reveal."

[*Dissenting Opinion* --page 5]

I conclude therefore that in an evidence *destruction* case we do not require the defendant to show that the destroyed evidence is exculpatory. Therefore our earlier decision in ***State v. O'Rear*** is inapposite. This difference disposes of the state's claim that we are bound by the "law -of-the-case" of our 1982 decision.

My conclusion is not contrary to the holdings

of the United States Supreme Court in ***California v. Trombetta***, 467 U.S. 479 (1984) and ***Arizona v. Youngblood***, 488 U.S. 51 (1988). In each of those cases, there was no claim that the state had failed to act in good faith. In ***Trombetta***, breath samples were destroyed in "good faith and in accord with [the police's] normal practice." 467 U.S. at 488. In ***Youngblood***, the police negligently failed to refrigerate clothing on which there were semen stains and failed to perform tests on semen samples. The semen samples became unusable through the lapse of time. It is significant, however, that in ***Youngblood*** the Court noted: "None of this information was concealed from respondent at trial, and the evidence -- such as it was -- was made available to respondent's expert who declined to perform any tests on the samples." 488 U.S. at 58.

Youngblood is also significant for the following statement:

> [T]he Due Process Clause...[does not] impos[e] on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular

[*Dissenting Opinion* --page 6]

> prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the

> part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

Id.

Here, the police did not destroy the cigarette butt in accordance with their normal practice. According to the property and evidence officer, the only reason the cigarette butt would have been destroyed prior to trial was because someone other than that officer had decided that the cigarette butt either had no value as evidence or that it would not be used as evidence in the case. The danger of allowing the state to destroy evidence under such circumstances and then use testimony as to that evidence to prove its case against the criminal defendant is apparent. With respect to the latter, I am impressed by the fact that the ***Youngblood*** Court noted that there is a difference between the state's general obligation to preserve evidence and its duty when it uses such evidence in its attempt to show the defendant's guilt. ***Youngblood*** dealt solely with the "undifferentiated and absolute duty" of the police to retain and preserve all material that might be of any conceivable evidentiary significance in a particular prosecution. Here, the state must be presumed to have known it would use the evidence of the cigarette butt in its prosecution. I

[*Dissenting Opinion* --page 7]

conclude that the state exhibited constitutional bad faith when it destroyed that evidence so that it was not available to the defendant.

The remaining issue is harmless error. I conclude that ***Amundson*** establishes that the state's "bad faith" destruction of evidence is subject to harmless error analysis. *See* 69 Wis.2d at 579-580, 230 N.W.2d at 789. I further conclude, however,

that admission of the testimony as to the cigarette butt was not harmless error.

I first consider the testimony as to the cigarette butt itself. Deputy Sheriff O'Donohue testified that she found a cigarette butt at the scene of the alleged crime which she believed was from a "hand-rolled" cigarette. Cross-examination of O'Donohue was not a satisfactory alternative to examination of the cigarette butt itself.

I next consider the other evidence of O'Rear's guilt. In our 1982 decision we emphasized that the jury's verdict turned on the jurors' assessment of the credibility of the complainant and O'Rear. We noted the lack of any physical evidence other than the cigarette butt placing O'Rear at the scene of the alleged crime. I consider that this fact and the following facts conclusively establish that the admission of the cigarette-butt testimony was prejudicial to O'Rear's defense.

Immediately after the alleged assault, the complainant told no one of the assault, although she had an opportunity to do so. Instead, she showered and went to bed. She did not report the incident to the police until eight to nine hours after the

[*Dissenting Opinion* --page 8]

alleged assault. Hair samples were obtained from O'Rear but the state claimed that the samples were unsuitable for scientific analysis.

The complainant testified that at the time of the assault, her vagina was "very tight, very dry," and that O'Rear kept "ramming" her for about five minutes before penetrating her after which he continued to "ram" her. However, a next-day medical examination revealed no lacerations or bruises, her genitalia were normal and there were no anal lesions. The state listed the doctor who conducted the examination of the complainant and

his assisting nurse as witnesses, and the prosecutor privately told the court and defense counsel at the end of the first day of trial that he would call both witnesses before he rested. However, he did not call either witness or present the medical report.

The crime lab expert testified that the lab results of traces of semen could not link such semen to O'Rear and that it was possible that these traces resulted from consensual sexual intercourse that the complainant engaged in the previous evening.

I therefore conclude that the erroneous admission of the testimony as to the cigarette butt was not harmless error. The test for harmless error is whether there was a reasonable possibility that the error contributed to the conviction. ***State v. McAllister***, 153 Wis.2d 523, 530, 451 N.W.2d 764, 767 (Ct. App. 1989). I conclude that there is a reasonable possibility that the error of admitting the testimony as to the cigarette butt contributed to O'Rear's conviction.

[*Dissenting Opinion* --page 9]

I recognize that retrying O'Rear more than eleven years after the alleged offense creates significant problems of proof. However, the delay in again reaching our court cannot be attributed to O'Rear's lack of diligence. He timely appealed his conviction to our court and his petition for review of our decision was denied by the supreme court on March 9, 1983. On May 26, 1983, he was released from prison on earned parole based on good behavior. Following his release, O'Rear sought habeas corpus relief from the U.S. District Court for the Western District of Wisconsin. The proceedings in the district court, the Seventh Circuit Court of Appeals and the United States Supreme Court were not completed until February 22, 1988. Appellate

review in the federal judicial system was denied based on the finding that O'Rear was no longer "in custody" within the meaning of 28 U.S.C. § 2254.

If protestation of innocence constituted evidence, O'Rear would make a strong case. However, his diligence does demonstrate that he is not engaged in "recreational litigation." O'Rear no longer seeks restoration of his liberty; he seeks restoration of something infinitely more precious, his good name. I would give him the opportunity he seeks.

APPENDIX B

[Decision Below - Supreme Court of Wisconsin]
[(a/k/a the state court of last resort for Wisc.)]
[May 11, 1992]
[Order Denying Discretionary Review]

[page 1 of 1]

Office of the Clerk
SUPREME COURT [STATE OF WISCONSIN]
231 E. STATE CAPITOL; P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
TELEPHONE 608-266-1880

To:

May 11, 1992

Hon. Michael B. Torphy, Jr.
Dane County Circuit Court
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Madison, WI 53709

John H. Bowers
Aaron N. Halstead
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District Attorney
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Madison, WI 53709-0001

Sally L. Wellman
Asst. Attorney General
P.O. Box 7857
Madison, WI 53707
-7857

You are hereby notified that the Court has entered the following order:

No. 91-0832 O'Rear v. State L.C. #89CV5909

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of petitioner-appellant-petitioner Terry J. O'Rear, and considered by the court,

IT IS ORDERED that the petition for review is denied without costs.

Marilyn L. Graves
Clerk of Supreme Court

APPENDIX C

[Decision Below, Wisc. Court of Appeals, Dist. IV]
[December 26, 1991]
[Preliminary Order re: supplemental briefing]

[page 1 of 1]

District IV
Office of the Clerk
COURT OF APPEALS
OF WISCONSIN

Marilyn L. Graves
Clerk

December 26, 1991

TO:

John H. Bowers
Arleen H. Wolek
Lawton & Cates
214 W. Mifflin
Madison, WI 53703

Sally L. Wellman
Asst. Attorney General

C. William Foust, D.A.
Rm. 305, City-County Bldg.

You are hereby notified that the Court entered the following order:

No. 91-0832 O'Rear v. State
Before Eich, C.J.

The court desires supplemental briefing on the following question: "To what extent is our December 13, 1982, decision in *State v. O'Rear*, no. 82-809-CR, the law of the case insofar as this appeal is concerned?" A copy of that decision is attached.

Therefore,

IT IS ORDERED that the appellant shall file a supplemental memorandum brief within fifteen days of the date of this order. The respondent may file its supplemental brief within fifteen days of service of the appellant's brief. The appellant may then file a supplemental reply brief within seven days.

Marilyn L. Graves
Clerk of Court of Appeals

APPENDIX D

[Decision Below - Dane County (State of Wisconsin) Circuit Court, Branch 2 (Judge M.B. Torphy)]
[March 21, 1991]
[ORDER Granting Motion to Quash the Writ of Error *Coram Nobis* previously issued]

[page 1 of 1]

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 2 | DANE COUNTY

TERRY O'REAR,
Petitioner,

-vs- Case Number 89-CV-5909

STATE OF WISCONSIN,
Respondent.

ORDER GRANTING MOTION TO QUASH

The Respondents' Motion to Quash came on for hearing December 12, 1990, having previously been briefed by the parties, Petitioner appearing in person and by counsel, Lawton and Cates, by Attorneys John Bowers and H. Arleen Wolek, and Respondents appearing by Dane County District Attorney C. William Foust.

For the reasons set forth in this court's decision on Motion to Quash of February 21, 1991,,

IT IS HEREBY ORDERED THAT the Respondents' Motion to Quash is granted and this action is dismissed.

Dated this 21 day of March, 1991.

[signed: Michael B. Torphy]
Judge Michael B. Torphy
Dane County Circuit Court, Branch 2
Madison, Wisconsin

APPENDIX E

[Decision Below - Dane County (State of Wisconsin) Circuit Court, Branch 2 (Judge M.B. Torphy)]
[February 21, 1991]
[DECISION on Granting Motion to Quash the Writ of Error *Coram Nobis* previously issued]

[page 1]

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 2 | DANE COUNTY

TERRY O'REAR,
Petitioner,
vs.
STATE OF WISCONSIN,
Respondent.

Case No. 89CV5909

DECISION ON MOTION TO QUASH

The action is a Petition for Writ of Error Coram Nobis. The matter now presented is a Motion to Quash. Written and oral arguments have been presented.

In condensed form the position of O'Rear is as follows:

1.) Evidence of the finding of a hand-rolled cigarette butt in the parking lot, in which the victim of the sexual assault testified the assault took place, was admitted at trial. As well, evidence that the petitioner smoked hand-rolled cigarettes was admitted.

2.) At trial, and subsequently, the actual cigarette butt was not produced and could not be found on the assertion that it had "disappeared" or been lost.

3.) There was never any testing of the cigarette butt by the State, and the defense never asked for production at trial.

4.) The records of the police property room indicate that the butt was "destroyed" prior to

the criminal trial as opposed to being "lost" or "mislaid".

5.) Had the fact of the "destruction" of the cigarette butt been known at the time of trial, the conviction of O'Rear could not have been entered.

The position of the State is that the conclusion (5.) above) does not follow from the facts of 1.) thru 4.).

If the trial court had known that the butt had been "destroyed", it could have excluded

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[page 2]

any evidence concerning the "finding" of such a butt in the parking lot. The question then is: "Could the judgment of conviction be entered on the evidence presented (absent that of the finding of a cigarette butt)?" The answer is, of course, a judgment could have been entered. The victim testified factually as to the commission of a sexual assault and identified O'Rear as the perpetrator. Such evidence certainly allows entry of a judgment of conviction.

The second alternative, at trial, would have been that evidence of the "finding" of this non-specifically identified cigarette butt was allowed into the record. O'Rear argues that, in such an instance, the "destroyed" evidence would have to be deemed exculpatory to him. The maximum "exculpation" would be that the butt was not his or was someone else's.

(It can be strongly argued that, in this scenario, the evidence and the presumption of it being exculpatory would not be admitted on relevancy grounds because it does not tend to make more or less probable the "fact" asserted that O'Rear did not commit the assault, nor does it tend to affect the credibility of either O'Rear or the victim. The sum of the evidence is that a cigarette butt, found in the parking lot, was not O'Rear's.)

However, assuming the admission of this "exculpatory" evidence, the question remains: "Could a judgment of conviction have been entered?" Again, the answer is "of course". The basis again - hearing the specific evidence given by the victim.

The question presented is not what the affect of the "now known fact" of "destruction" of the cigarette butt would have been on the various reviews of the conviction, as seems to be argued on occasion and in part by O'Rear.

The question is: Could judgment of conviction have been entered if, at trial, it had been known that the cigarette butt had been "destroyed"? The answer, unavoidably, is "yes".

[page 3]

[There are facial assertions in the petition that there was no evidence of O'Rear's guilt at trial other than the finding of the cigarette butt. Such argument is also maintained in the written and oral arguments of O'Rear. However, it is also conceded by O'Rear that the victim, in this case, fully testified as to the commission of a sexual assault by him and that he denied the same. This status of the evidence is not really in issue. It is the now discovered "destruction" of the cigarette butt that forms the basis for this petition.]

The motion to quash is granted.

Date: *2-21-91*

BY THE COURT:

[Signed: M.B. Torphy Jr.]
Michael B. Torphy, Jr., Judge
Circuit Court, Branch 2

APPENDIX F

[Decision Below - Dane County (State of Wisconsin)
Circuit Court, Branch 6
(Judge J.C. Boll - original trial judge)]
[December 20, 1989]
[**Order Granting A Writ of Error *Coram Nobis***]

[page 1 of 1]

STATE OF WISCONSIN — CIRCUIT COURT BRANCH 6 — DANE COUNTY

TERRY J. O'REAR,
Petitioner

-vs- CASE NO. 89 CV 5909

STATE OF WISCONSIN,
Respondent.

ORDER GRANTING
A WRIT OF ERROR CORAM NOBIS

Pursuant to a status conference on December 14, 1989 with the petitioner Terry J. O'Rear appearing in person and by counsel H. Arleen Wolek, and with District Attorney William Foust appearing for the respondent State of Wisconsin,

IT IS ORDERED;

That a writ of error coram nobis shall be granted to the petitioner, Terry J. O'Rear.

Dated this 20 day of December, 1989.

BY THE COURT:

[Signed: James C. Boll]
Hon. James C. Boll

APPENDIX G

[Decision Below, **Wisc. Court of Appeals**, Dist. IV]
[December 13, 1982 -- Case No. 82-809-CR]
[Final Decision affirming Trial Court's denial of motion for new trial]
[a/k/a for today's Petition for Cert.: **O'Rear I**]
[also filed as Exb 11 to *Coram* Petition App. AA, *infra*]
[page 1]

COURT OF APPEALS
DECISION
DATED AND
RELEASED
DEC 13 1982

FILED
DEC 13 1982
CLERK OF COURT OF
APPEALS OF
WISCONSIN

No. 82-809-CR
STATE OF WISCONSIN — IN COURT OF APPEALS — DISTRICT IV

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
TERRY J. O'REAR,
Defendant-Appellant.

APPEAL from orders of the circuit court for Dane county: JAMES C. BOLL, Judge. Affirmed.

Before Gartzke, P.J., Bablitch, J. and Dykman, J.

GARTZKE, P.J. After a jury trial, defendant was convicted of second-degree sexual assault and false imprisonment, secs. 940.225(2)(a) and 940.30, Stats. He was sentenced to concurrent terms of six years and one year, respectively. He appeals from the trial court's orders denying his motion for a new trial and to modify his sentences. We affirm.

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The issues are:

1. Was it reversible error not to strike testimony regarding physical evidence lost by the state before trial?

2. Was defendant denied a fair trial by the state's failure to disclose exculpatory information?

3. Does the state's failure to disclose the results of scientific tests require a new trial?

4. Should a new trial be granted because the state failed to correct false testimony?

5. Should a new trial be granted in the interests of justice?

6. Did the trial court abuse its discretion when imposing sentence?

1. Motion to Strike Testimony

Complainant claimed that defendant assaulted her in the parking lot of the Speedway Bar. It is undisputed that defendant smokes cigarettes which he rolls by hand. Officer Mary Jo O'Donohue testified that she found a handrolled cigarette butt in the parking lot of the Speedway Bar. Because the cigarette butt was not put in evidence, defendant moved to strike O'Donohue's testimony when the state rested. He asserts that the

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trial court's denial of his motion requires a new trial. O'Donohue's testimony regarding the cigarette butt was the only evidence, physical or oral, which tended to corroborate the complainant's testimony that she and defendant had been in the Speedway Bar parking lot. We therefore review the testimony relevant to the motion to strike.

Complainant said that defendant smoked marijuana and tobacco cigarettes on the way to a party they attended which broke up about 3:00 or 4:00 a.m., January 2, 1980, the morning of the

claimed assault. She said he rolled his own cigarettes and carried tobacco and rolling papers in a pouch. The next witness, O'Donohue, testified that January 2, 1980 Officer Dreifke told her to check the east side of the Speedway Bar parking lot near piles of tires for a handrolled cigarette butt. She said she found such a cigarette butt about midnight that day east of the bar in the parking lot. She said she looked at it carefully, and that because she had smoked for about fifteen years she knew the difference between a handrolled cigarette and one from a pack. She put it in the sheriff's evidence room. She did not know whether it was still there. The responsibility for preserving the evidence was with Deputies Dreifke and Kretschman.

Officer Dreifke testified that he spoke with complainant about 2:00 p.m., January 2, 1980, when she reported an assault at the

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Speedway Bar. She told him the man had rolled his own cigarettes and may have thrown one or two out of the window at that location. Dreifke told O'Donohue to search that location. Officer Burt described the physical evidence which he received, but said nothing about a cigarette butt. Officer Kretschman found tobacco and cigarette rolling papers on defendant's person when he was arrested. He said nothing about a cigarette butt.

When moving to strike O'Donohue's testimony, defendant's trial counsel said he had waited until the end of the state's case to see if the state would produce the cigarette butt. He said, "I think it's a key item of the evidence and they have not produced it today if in fact it existed. And without producing that and identifying that in Court, I think the testimony is improper and should be stricken." The court ruled that O'Donohue could describe what she found, and that the failure to

produce the cigarette butt went to the weight of her testimony.

In response to defendant's motion for a new trial, the prosecutor stated that his office had relied on the sheriff's department to preserve the physical evidence and that he was unaware the cigarette butt was missing until Officer Burt testified. When denying the motion, the court said the loss was caused by an error of the law enforcement authorities. The court said that the prosecution introduced evidence regarding the

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cigarette butt to "bolster" the state's case, but the jury must have given minuscule weight to it. The court found that in view of the number of people who smoke and go to taverns, it could not be said that a juror would give much weight to a rolled cigarette found hours after an alleged event. The court concluded that, considering the weight to be given the evidence, and that the prosecution lost the cigarette butt in good faith but did not destroy it, a new trial should not be granted. The prosecutor subsequently told the court that he learned of the loss when reviewing Officer Burt's testimony just before Burt took the stand. The court said that this did not change its ruling.

Defendant's argument that O'Donohue's testimony should have been struck has no merit, insofar as it is based on Rule 904.03, Stats. Trial counsel made no reference to the unfairness on which appellate counsel rely. Trial counsel did not move to strike on grounds of unfair prejudice. The balancing of probative value against prejudice required by Rule 904.03 is a discretionary decision. Accordingly, the scope of our review is whether the trial court abused its discretion. Failure to exercise that discretion is an abuse of discretion only if, as a general rule, the trial court was called on to exercise discretion. For that reason, McClelland v. State, 84

Wis.2d 145, 157-58, 267 N.W.2d 843, 848-49 (1978), held that a trial court cannot be faulted for failure to exclude evidence on grounds of unfair prejudice if that objection has not been made.

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Defendant contends that the prosecutor's pretrial failure to disclose the loss was prejudicial in another sense: it deprived him and the court of an opportunity to consider the admissibility of O'Donohue's testimony before it was given, with no explanation why and how the evidence was lost. Defendant asserts that the explanation is necessary under State v. Amundson, 69 Wis.2d 554, 230 N.W.2d 775 (1975). We disagree.

Amundson dealt with evidence which might have been exculpatory but was destroyed by police -- defendant's recorded conversations. The Amundson court noted that prosecutorial suppression of exculpatory evidence violates due process, regardless of the prosecution's good faith. Brady v. Maryland, 373 U.S. 83, 87 (1963); Nelson v. State, 59 Wis.2d 474, 479, 208 N.W.2d 410, 412 (1973). If the prosecution has destroyed evidence, however, the defendant must show that it was material to the issue of guilt or innocence. Amundson, 69 Wis.2d at 578, 230 N.W.2d at 788. Because one way to suppress exculpatory evidence is to destroy it, and because destruction prevents a defendant from learning whether the evidence was exculpatory, the good or bad faith of the state when destroying the material may reflect its true nature and must be considered by the trial court. 69 Wis.2d at 579, 230 N.W.2d at 789. Accordingly, Amundson held that the burden of producing evidence, or of explaining its destruction, falls on the state. Id.

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Consequently, when the state relies on missing

evidence it claims was inculpatory, a defendant's rights under Amundson pertain only to evidence which could have been exculpatory. Here, however, it is impossible for the missing evidence to have been exculpatory. The fact, if it is a fact, that the cigarette came from a pack, or that another person rolled it, cannot exculpate defendant. Neither fact tends to establish his innocence or makes his guilt less likely. Neither fact tends to establish that defendant was not where complainant said the assault occurred. Compare People v. Bruno, 386 N.E.2d 550, 554-55 (Ill.App. 1979) (state's loss of clothing worn by defendant and victim did not require reversal where inferences from the claimed condition of the clothing were not necessarily exculpatory); People v. Steptoe, 343 N.E.2d 1, 4-5 (Ill.App. 1976) (state's failure to produce lost bag on which defendant allegedly wrote robbery note not reversible error because the bag would not tend to exculpate defendant).

Accordingly, we need not determine whether the finding by the trial court that the cigarette butt had been lost in "good faith" can stand, considering the lack of evidence that it was lost, misplaced or destroyed. Nor need we review the contention that the trial court's views on the weight the jury gave to O'Donohue's testimony constitutes an erroneous application of the harmless error rule. No error occurred.

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2. Failure to Disclose Other Exculpatory Evidence Before Trial

We reject the contention that the state's failure to disclose exculpatory information makes a new trial necessary. If defendant demands specific exculpatory information, the state must disclose it. Tucker v. State, 84 Wis.2d 630, 642, 267 N.W.2d 630, 637 (1978). Defendant concedes that only a general request was made.

> Where only a general request for exculpatory evidence is made, a prosecutor's duty is limited to disclosing evidence which is so clearly and obviously supportive of the defendant's claim of innocence that the prosecutor must be held to have notice of his duty to disclose it. United States v. Agurs, 427 U.S. 97, 106-07 (1976); Tucker v. State, 84 Wis.2d 630, 642, 267 N.W.2d 630 [,637] (1978).

State v. Humphrey, 107 Wis.2d 107, 115, 318 N.W.2d 386, 390 (1982).

The facts which defendant contends should have been disclosed pertain to complainant's sexual relations with another man about twenty-four hours before the alleged assault and to her possession of an inhalent referred to as "rush." Those facts, as defendant concedes, are not clearly and obviously supportive of his innocence. The prosecutor had no duty to disclose those facts, absent a specific demand.

Defendant maintains that evidentiary objections made during the preliminary hearing and pretrial reports exchanged by the parties were the

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equivalent of a specific demand for this evidence. We disagree. The prosecutor need not divine a specific request for exculpatory material from evidentiary objections and reports.

In any event, defendant possessed the information before the trial. He admitted that before the alleged assault complainant told him she had sexual relations the previous evening. He testified he saw complainant using "rush." Disclosure of exculpatory evidence is required only of information within the exclusive possession and control of the state. State v. Sarinske, 91 Wis.2d 14, 36, 280

N.W.2d 725, 735 (1979); Amundson, 69 Wis.2d at 573, 230 N.W.2d at 785-86.

Defendant argues that although he had general knowledge of this evidence, information as to the identity of complainant's sexual partner, and the contents of the "rush" bottle, its effects and the place where it was purchased, remained in the exclusive possession and control of the state. However, an important factor in determining whether defendant was denied due process is whether defendant fails to pursue information that was available to him. State v. Clarke, 49 Wis.2d 161, 179, 181 N.W.2d 355, 364 (1970). Defendant knew of complainant's using "rush" and of her sexual activity. Defendant had knowledge of the general facts and could have requested the state to disclose specific details. Because defendant did not follow up on his knowledge, we cannot hold that the state

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unconstitutionally suppressed evidence relating to the complainant's sexual activity or use of "rush."

3. Failure to Disclose Lab Test Results Before Trial

Defendant contends that a new trial is necessary because the state failed to disclose that samples of his hair were unsuitable for scientific analysis. Defendant had moved under sec. 971.23(5), Stats., for an order requiring the state to disclose the results of scientific testing. Under sec. 971.23(7), failure to disclose test results in violation of defendant's discovery motion is grounds to exclude the results. Wold v. State, 57 Wis.2d 344, 349-51, 204 N.W.2d 482, 487-88 (1973). We conclude that the defendant waived his right to claim error.

A state crime laboratory expert testified outside the presence of the jury that complainant was excluded as the source of two hairs found on her

sweater. The expert said the unsuitability of defendant's hair samples for testing made it impossible to eliminate or confirm him as the source of the hair. Defendant's trial counsel commented they were "on safe ground." The jury then heard the testimony. We conclude that a new trial need not be had. Defendant's failure to object to the expert's testimony waived the right to claim error based on violation of discovery rights. State v. Hoffman, 106 Wis. 2d 185, 214, 316 N.W.2d 143, 159 (Ct.App. 1982).

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Defendant's appellate counsel claim his trial counsel was misled. The claim is that the state's failure to disclose the unsuitability of the hair samples deprived defendant of an opportunity to present exculpatory evidence. Appellate counsel contend that admission of this evidence was plain error because it permitted the jury to infer that the unsuitability of defendant's hair samples was his fault. We disagree.

"Plain error" in evidentiary matters is error affecting "substantial rights." Sec. 901.03(4), Stats. Plain error must be both substantial and obvious. Sykes v. United States, 373 F.2d 607, 612 (5th Cir. 1966), cert. denied, 386 U.S. 977 (1967). Section 971.23(7), Stats., does not automatically require the exclusion of test results where a party fails to comply with a discovery order under sec. 971.23(5). Wold, 57 Wis.2d at 351, 204 N.W.2d at 487-88. Defendant could waive his right to claim the error relied on. Hoffman, supra.

The test results were inconclusive. It was understandable that defendant's trial counsel would waive the right to object to the jury's hearing evidence which was neither inculpatory nor exculpatory. Admission of the test results under these circumstances was not obvious error, and, because the test was inconclusive, defendant's substantial rights were not affected.

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4. False Testimony

According to defendant, a statement by the complainant was falsely corroborated by the state's expert. Complainant testified that defendant's semen might have been deposited on her pant leg. The state's expert testified she found traces of acid phosphatase on complainant's pants. The expert said that acid phosphatase is an enzyme produced in the male prostate gland and is often found in seminal fluids. The expert added that "[t]he chemical substance was inconclusive; that means to me that I found acid phosphatase but I could not confirm that with seminal material." False corroboration did not occur. The expert did not confirm the presence of seminal material on complainant's pant leg.

Defendant's appellate counsel also contends the expert's testimony as to the presence of acid phosphatase was false because it was inconsistent with the expert's lab report. The report does not expressly state that acid phosphatase was found on complainant's pants. The report states: "Chemical substances characteristic of seminal material were inconclusive from stains on items C [panties] and D3 [vaginal/cervical swabs]." Page two of the report states: "No seminal material was detected on items A [sweater], B [pants] and D4 [rectal swab]."

The expert's testimony as to the presence of acid phosphatase on complainant's pant leg was adduced on cross-examination by defendant.

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Defendant's trial counsel had a copy of the report. Appellate counsel apparently construes the report to mean that acid phosphatase was found on complainant's panties but not on her pants. Defendant's trial counsel had opportunity to explore

through further cross-examination whether acid phosphatase was found on complainant's panties and not on her pants. Trial counsel's failure to follow up on the possible confusion or ambiguity waived any right to complain of false testimony on appeal.

5. Discretionary Reversal In Interests of Justice

Defendant requests a new trial under sec. 752.35, Stats., on grounds that justice probably has miscarried. He recognizes we are not to grant a new trial on those grounds unless it appears, with a substantial degree of probability, that a new trial will produce a different result. Roe v. State, 95 Wis.2d 226, 243, 290 N.W.2d 291, 300 (1980).

Defendant emphasizes that the complainant's testimony is almost the only evidence that complainant was assaulted and that defendant assaulted her. No independent witness saw the assault or even saw the parties where the assault was said to occur. No evidence was produced of physical injuries to complainant, such as bruises, abrasions or torn tissue. No conclusive scientific tests were performed. The jury's verdict turned on the jurors' assessment of the credibility of complainant and defendant.

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Defendant asserts that a new trial would eliminate evidence which impeached his credibility. He contends that if Officer O'Donohue's testimony regarding the cigarette butt had been omitted, the credibility of his assertion that he was never in the parking lot would not have been damaged. We are unconvinced that the testimony of O'Donohue was as damaging as the defendant claims. Appellant counsel skillfully argue a prejudice to defendant which was not relied on by trial counsel, who had ample opportunity to learn from defendant whether he could indeed identify a rolled cigarette butt as not his. We cannot ignore the conclusion of the judge

who heard the case that O'Donohue's evidence could have had little weight with the jury. It is not probable a different result would probably occur in a trial which omits reference to the cigarette butt.

Defendant relies on two pieces of proof which he argues should have reached the jury. The first is the report of the physician who examined the complainant January 2, 1980. That report shows that she was unagitated and in no apparent distress, and that she exhibited no sign of an involuntary assault. Arguing that the events she described should have left some observable effect, defendant asserts that the absence of those effects is an exculpatory fact which should have been presented. We disagree. Defendant's counsel brought out in cross-examining complainant that the attack involved no violence, which explained the

absence of physical evidence. His counsel was in a position to argue the absence of proof as to any other effect.

The second piece of evidence relates to a claim that the clothing tested by the crime laboratory were not that which complainant submitted to the law authorities. The clothing she submitted to the authorities was described as pink panties, blue socks, blue pants, and a brown sweater. The clothing tested by the crime laboratory was described as a peach colored sweater, black corduroy pants, and peach colored panties. Whether the panties were peach or pink, the pants were black or blue, and a sweater was brown or peach is not that significant. As the state notes, different people can describe the same color in different terms.

Finally, defendant reasserts each of the contentions of error we have previously addressed. Because we found that no error occurred, and adding them together adds nothing, we do not consider those arguments in determining whether a new trial is

required in the interests of justice. Mentek v. State, 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976).

Because it does not appear with a substantial degree of probability that a new trial would produce a different result, we cannot exercise our discretionary power under sec. 752.35, Stats., to provide that relief.

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6. Sentences

Second-degree sexual assault is sexual contact or sexual intercourse with another person without the consent of that person by use or threat of force or violence, a felony punishable by a fine not to exceed $10,000 or imprisonment not to exceed ten years, or both. Secs. 939.50(3)(c) and 940.225(2)(a), Stats. False imprisonment consists of intentionally confining or restraining another without the person's consent and with knowledge that he or she has no lawful authority to do so, a felony punishable by a fine not to exceed $10,000 or imprisonment not to exceed two years, or both. Secs. 940.30 and 939.50(3)(e), Stats. The complainant testified that defendant entered her vaginally for approximately five minutes, then achieved slight anal penetration, and then entered her vaginally for a second time, longer than the first. She said he was forceful but not violent and that she was frightened.

A strong policy exists against appellate interference with the trial court's discretion in passing a sentence. State v. Killory, 73 Wis.2d 400, 408, 243 N.W.2d 475, 481 (1976). If that discretion has been exercised and not abused, we cannot set a sentence aside. The burden is on the defendant to show an unreasonable and unjustifiable basis in the record for the sentence. Elias v. State, 93 Wis.2d 278,282, 286 N.W.2d 559, 560 (1980). The three factors most relevant to sentencing consist of the

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gravity of the offense, the character of the offender

and the need for the protection of the public. State v. Lynch, 105 Wis.2d 164, 167, 312 N.W.2d 871, 873 (Ct.App. 1981).

Defendant, who never before was accused of violent behavior against a human being, who aspires to an academic career and is a doctoral candidate, insists he is innocent. Knowing, however, the effect of a finding of guilt, he asked the trial court to consider his past good behavior and character, and possible contributions to society in the future. The court acknowledged the difficulty of its decision, discussed the seriousness of the offenses, and took into account the need for punishment to deter others, the defendant's superior intelligence and testimony that his treatment is necessary.

Defendant contends that the trial court abused its discretion because the facts of his crimes and his personal history do not match the seriousness of other convictions for sexual offenses in Dane County, but his sentences are among the more severe imposed. The trial court took into account the factors most relevant to sentencing. We may therefore find an abuse of discretion only if the sentence is so excessive and unusual and disproportionate to the offense as to shock public sentiment and violate the judgment of reasonable people. Ocanas v. State, 70 Wis.2d

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179, 185, 233 N.W.2d 457, 461 (1975). We cannot find that the sentences are shockingly disproportionate.

By the Court. -- Orders denying motions for a new trial and to modify sentence are affirmed.

Inclusion in the official reports is not recommended.

APPENDIX H

[Decision Below - Supreme Court of Wisconsin]
(a/k/a the state court of last resort for Wisc.)
[March 9, 1983]
[Order Denying Discretionary Review]
[also filed as Exb 13 to *Coram* Petition App. AA, *infra*]

[page 1 of 1]

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Hon. James C. Boll
Circuit Court for
Dane County
Br. 6,
City-County Bldg.
Madison, WI 53709

Madison, March 9, 1983

Richard L. Cates
James W. Gardner
Lawton & Cates
110 E. Main St.
Madison, WI 53703

To Chris Heikenen
Asst. Attorney General

Donald Antoine
Asst. District Attorney
City-County Bldg.
Madison, WI 53709

The Court today announced an order in your case as follows:

No. 82-809-CR State v. O'Rear (T.C. #80 CF 14)

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-appellant-petitioner Terry J. O'Rear, and considered by the court,

IT IS ORDERED that the petition is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court

APPENDIX I

[Decision Below - Dane County (State of Wisconsin) Circuit Court, Branch 6 (Judge J.C. Boll)]
[April 21, 1982]
[Order Denying Motion for New Trial]

[page 1 of 1]

STATE OF WISCONSIN | CIRCUIT COURT BRANCH VI | DANE COUNTY

STATE OF WISCONSIN,
Plaintiff-Respondent
vs.
Case No. 80-CF-14
TERRY J. O'REAR,
Defendant-Appellant

ORDER DENYING MOTIONS FOR NEW TRIAL AND MODIFICATION OF SENTENCE

It Is Herewith Ordered that defendant's Motion for New Trial is denied. This Order is made for the reasons fully stated by the Court from the Bench on November 16, 1981.

It Is Herewith Further Ordered that defendant's Motion for Modification of Sentence is denied except that he shall be given proper credit for time served prior to conviction. This Order is made for the reasons fully stated by the Court from the Bench on November 16, 1981. The modification of sentence refered to herein has been formalized by an Amended Judgment of Conviction Sentence To Confinement previously filed herein.

Dated this 21 day of April, 1982.

By the Court:

[*Signed James C. Boll*
HONORABLE JAMES C. BOLL
Circuit Judge

APPENDIX J

[Here are set forth portions of the Official Transcript including the **Conclusions of Law & Findings of Fact Orally Given and Transcribed BELOW** regarding the issue of the missing/destroyed evidence and presentations from both sides regarding same made **at the Postconviction Motion Hearing, held Nov. 16, 1981 before the original Trial Court** -Dane County (State of Wisconsin) Circuit Court, Branch 6 (Judge J.C. Boll) State of Wisconsin v. O'Rear, # 80-CF-14; **Numbered Below as document # R-76** & also filed, in part, as Exb 10 to *Coram* Petition App. AA, *infra*]

- [page 91] -

[Continued argument before the Court (Judge Boll) by DEFENSE-Appellant COUNSEL, MR. GARDNER]: know that the lady in question gets out to find the cigarette. Now, Officer O'Dohahue (ph.) doesn't go out until the middle of the night of, at least, the following day. So, at least twenty-four hours have gone by.

Now, given this context, I don't know if a cigarette butt would make it. Cigarette paper tends to dissolve in water, freezing and melting water, and traffic over the area could have crunched the cigarette butt. So, we don't know what it is Miss O'Donohue picked up, and we're not able to test it because she said it was a rolled -- self-rolled cigarette butt, and we're forced to admit.

Now, the Court didn't have the opportunity to think of these other indicia of whether or not what she was saying was accurate, and was forced to make a ruling because nobody knew what was the fact until it was already in, and that's important, that's significant, and we were deprived of it. Terry O'Rear was deprived of it, and I think in light of that, the ruling, I believe, should have been different.

But, more importantly, if the ruling had been the same, I believe the Court would have required foundation, or if the defense lawyer had known that the cigarette butt wasn't to be presented, he could

[statement continues on next Appendix page]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Nov. 16, 1981**
Postconviction Motion Hearing by Trial Court
Numbered Below as document # **R-76**]

- **[page 92]** -

[Continued argument before the Court (Judge Boll) by DEFENSE-Appellant COUNSEL, MR. GARDNER]

have required foundation.

Now, what foundation? Well, at the very least, you would hope Miss Tuman would testify that Terry O'Rear was smoking. You can search this record, and she does not say that he had a cigarette at that parking lot. There is no testimony to that. Miss O'Donohue says that she found the cigarett[e] butt at the east side of the parking lot. Miss Tuman doesn't say where they were parked. So, several very important pieces of foundation proof aren't there.

Miss Tuman doesn't describe the cigarette butt. She doesn't tell if it's green tobacco, green paper, purple paper, white paper. She doesn't tell what about it made her think it was a self-rolled cigarette, such as that it didn't have a filter, because it was loosely packed, or what. So we just don't know those things, and that's all foundation proof that would have allowed the Court to determine whether or not it was admissible. But, none of that was presented, and I believe none of it was presented because of the manner in which the proof came before the Court.

No one in that courtroom -- I don't know when Mr. Antoine told me he found out in court, so I guess he would have told me that in the hall, so I guess I can fairly say that no one in that courtroom

[statement continues on next Appendix page]

[Continued argument before the Court (Judge Boll) by DEFENSE-Appellant COUNSEL, MR. GARDNER]

knew when, and that's a significant deprivation. Nobody had proof. There was no way to test it. The defense was deprived of all the chances it would have had to test this very important piece of proof, and now you can say, "Well, you could have asked a lot of foundation, anyhow." Well, you're right, Mr. Strother could have. But, again, sir, if you know it's going to be there, and you know you can look at it, you might have any number of ways to respond to it. "It's not key. It's not crucial." And you worry about other things. The foundation only becomes key, only becomes crucial, when the element -- the cigarette butt itself isn't present.

Now looking at the effect that cigarette butt had, the admission of that cigarette butt, Terry O'Rear says, "I wasn't there." That's what -- it's that simple. "I am innocent. I wasn't there." Well, forget it. Nothing else positively, in any way, connects Mr. O'Rear with the crime. As a matter of fact, nothing else shows, beyond a reasonable doubt, that a crime occurred. There are no bruises, there is no indication of violence. It's just Miss Tuman saying, "Yes, it did," and Mr. O'Rear's saying, "No, it didn't." That's one piece of proof. It's the only thing in this record which Mr. O'Rear cannot respond to fairly, and that one piece of proof is the only independent piece of proof that puts

[statement continues on next Appendix page]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Nov. 16, 1981**
Postconviction Motion Hearing by Trial Court
Numbered Below as document # **R-76**]

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[Continued argument before the Court (Judge Boll) by DEFENSE-Appellant COUNSEL, MR. GARDNER]

Miss Tuman at the Midway bar. So, that piece of proof is key. It is the whole lawsuit because that really does -- that impeaches Mr. O'Rear, and it buttresses Miss Tuman's credibility, and because of the manner in which the proof came about, because of the way it came in, Mr. O'Rear didn't have a chance to fight it.

Now, you can say that he could have done things and, yeah, he could have. But, you pick the way you're going to fight based on what you believe the proof is going to be, and you have to do that. You can't -- a man runs one heck of a risk to fight on every point because he's going to alienate everybody in the courtroom. So, you can't -- you've got to fight what you think you can win. Mr. Strother made that choice. He can do that by looking at it and saying, "It's not mine," and saying why it's not his. But, now, he can't do that, and all of the other points he had to fight is gone. It's just disappeared.

THE COURT: Did he object, at the time that evidence was introduced, as to the cigarette?

MR. GARDNER: He objected, Your Honor, from the record, as soon as -- he objected after it was determined that it was lost. I believe he objected in a motion to strike at the close of the prosecution's case. I believe that was when the objection was made.

[statement continues on next Appendix page]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Nov. 16, 1981**
Postconviction Motion Hearing by Trial Court
Numbered Below as document # **R-76**]

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[Continued argument before the Court (Judge Boll) by DEFENSE-Appellant COUNSEL, MR. GARDNER]

Well, he made two. He also made one during the argument.

MR. CATES: I think he made one when he found out about it.

MR. GARDNER: Mr. Cates's recollection is that he also made one when he found out that it wasn't going to be presented, when it was lost.

THE COURT: I recall that.

MR. GARDNER: So, that one piece of proof is significant. In this case, it's key, and the Court can say, "Well, a lot of times we have testimony about things that are no longer available," and that is correct, and a lot of times we do.

But, in this case, I don't think we should have been allowed to. But, you can say, "Yes, we should have." But, if you say that, then the defense is entitled to the opportunity to test, and that opportunity is gone because with the way the proof came in, we don't know, positively, that it was missing until Mr. Burt testifies, and that's after Miss O'Donohue has already presented her testimony. All she knows is she doesn't know where it is now. Now, by that time, Mr. O'Rear is prejudiced, and he's prejudiced beyond the point of no return, and let me show you, Your Honor -- I was trying sir, as I was looking at this case, to say,

[pp. 96 - 101 omitted]

[Continued argument before the Court (Judge Boll) by DEFENSE-Appellant COUNSEL, MR. GARDNER]

you're finding it at the scene of the alleged crime. Those two things together, certainly, go a long way to saying -- supporting Miss Tuman's story, and Mr. O'Rear really couldn't respond because of the way it was presented in this case, and through, probably, nobody's fault. But, it was through the State's investigation that that was lost, and that's the other thing, sir, that the State has the duty to explain why it's lost.

Now, looking, Judge, and I don't mean to accuse anybody of anything, but we have all read of reported cases where a piece of evidence disappears because somebody working for the State someplace wanted it to disappear because it wasn't what it was supposed to be. Now, in this case, it's possible that somebody looked at this and said, "Clearly, this is not a self-rolled cigarette," and then threw it away. But, we don't know. I do know that the Sheriff's Department is trained. They follow procedures in safeguarding evidence. The evidence is put in a special place, and it's supposed to be guarded. It's supposed to be maintained, and now, all of a sudden, it's not here, and we don't even have an explanation as to why it's not here.

THE COURT: They said they lost it.

MR. GARDNER: Yeah, but they didn't say

[statement continues on next Appendix page]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Nov. 16, 1981**
Postconviction Motion Hearing by Trial Court
Numbered Below as document # **R-76**]

- [page 103] -

[Continued argument before the Court (Judge Boll) by DEFENSE-Appellant COUNSEL, MR. GARDNER]

how. All it is is that it's not there.

THE COURT: Yes.

MR. GARDNER: Well, you know, I guess, when all these things come in, I guess the conclusion is that that was key, that that was crucial, and Mr. O'Rear couldn't respond to it. I don't think that proof should have been in. I strongly believe that it shouldn't have. Well, you can rule that it should have been in. But, I think if you're going to admit it, before you make that final decision, you, as the trial -- as the person who's got to make that decision, has got a right to hear all the foundation to determine whether or not Miss O'Donohue is reliable and knows what she's saying. You have that right.

Now, if you have it, think of that poor defense. He's really got to have it because he can't respond except to say, "No, I wasn't." Well, Your Honor, I guess that's all I really have to say on it.

THE COURT: Mr. Antoine.

MR. ANTOINE: Your Honor, as to whether or not they were forced into that position, again, the Court talked earlier about the discovery statutes, viewing evidence, and there was no request made to view this particular piece of evidence by the defendant in

[statement continues on next Appendix page]

[Continued argument before the Court (Judge Boll) by PROSECUTING ATTORNEY, MR. ANTOINE]

this case, and it was never viewed. Had they viewed that, taken that step, which was their right, then they could have gone into the trial and said, "Now, certainly, you must establish a foundation before that evidence is admitted." But, they never did that. So, there was never any foundation that was established. In fact, there was no objection based on foundation. So, for that reason, for that very reason, I believe that was a tactical error, again, that the defendant made, and it should not be assessed against the State.

As far as whether or not this was such a key item, which the Court was directing its attention to earlier, I don't believe that it was. I view the evidence the same way the Court does. If the Court knows anyone who is upstairs, in the Dane County jail, who smokes, the Court probably knows somebody who rolls their own cigarettes.

Now, we're talking about the Speedway bar, which, I believe, is the correct name of the bar, which is west of the beltline on Mineral Point Road. We're not talking about the Park Motor Inn. We're talking about the type of bar that is frequented by people not in the higher-earning brackets, and I think it's entirely conceivable that there are people, many people, in that economic bracket, who roll their own

[statement continues on next Appendix page]

[Continued argument before the Court {Judge Boll} by PROSECUTING ATTORNEY, MR. ANTOINE]

cigarettes, and I would further state that I agree with the Court in its assessment as to whether that particular item was found -- Your Honor, it was found some -- almost twenty-four hours after the occurrence, and I don't believe that such a piece of evidence -- I don't believe that that piece of evidence -- that the whole case would turn, as the defense counsel would argue, given the entire circumstances surrounding the finding of that cigarette butt.

MR. CATES: Can I --

THE COURT: Surely, sir.

MR. GARDNER: I guess to go first, and this is really very, very short.

Mr. Antoine said that, "Well, if the defense had gone down and looked, they would have known." Well, that assumes something that we have no way of knowing. We don't know when it was lost. The defense could have gone down and looked. I don't know that the defense did or didn't. But, it really wouldn't have made much difference because it would have been lost on the way out. It could have been lost the night before. That's just unfair. You can't put that burden on the defense because we don't know when it was lost, and Mr. Antoine says, "Well, there are a lot of people going to this bar, the Speedway bar. There are a lot of lower

[statement continues on next Appendix page]

economic groups of people who are smoking their own rolled cigarettes." Now, assuming that's correct, that's a piece of foundation proof that the Court should have seen, and that we could have dealt with, that would have made for a reasonable decision on whether or not to admit it, and that's the very type of proof that wasn't presented.

THE COURT: Mr. Cates.

MR. CATES: The defense testified that he wasn't there, and that was the evidence, and the one thing that is equivalent -- well, Your Honor, the one thing for sure is that that isn't his cigarette. So, basically, if you're defending a lawsuit like this, that's a wonderful ground to fight on, and they're going to put something in evidence that, you know, that it can't be yours, it can't be his, and the State, they've got a tough case, her word against his, and they're going to use it and, Judge, I guess you really don't, necessarily, want to stop then, because, basically, you see it's - - how does a fellow -- you hit it correctly. This isn't "gut" proof, and in one dimension -- well, let's listen to what this fellow [The Asst. District Attorney, MR. ANTOINE] is telling us right now. "This is the Speedway bar, where folks roll and smoke your own," and in there -- and then, it's twenty-four hours after the fact. He's indicating his own piece of evidence.

[statement continues on next Appendix page]

[Continued argument before the Court {Judge Boll} by DEFENSE-Appellant COUNSEL, MR. CATES]

He's telling us that it ain't no good. But, then, the question, Your Honor, is why does he use it, if it ain't no good, and that's because he's got a thin case. He's got a tough lawsuit. He's got her word against his again, and you've got the all kinds of things that he's saying.

Now, this man has made the judgement. I don't care. This is a prosecutor who is supposed to concern himself with innocence, and he's now telling the Court, "I offered a piece of evidence, and it was nothing," and why did he do it? He did it to get an edge. He did it knowing that it -- he did it assuming -- easily, that -- he did it because there might not have been -- it might not have been there, it might not have been his cigarette because all these people at the bar roll their own. Well, Your Honor, I guess I'll put it this way: What he's telling the Court, you see, because there may be some person on the jury -- you know, you're entitled to twelve, and each and every one of them has to make up their own mind, and one of them on there just might be going to say, "My God, that there fellow smokes his own. They found his smoke." Now, that's why you put proof like this in. He knows it isn't good, but he doesn't care because his case isn't tight. He has to grasp, and the good trial lawyer, if Mr. Strother is thinking tactically,

[statement continues on next Appendix page]

[Continued argument before the Court (Judge Boll) by DEFENSE-Appellant COUNSEL, MR. CATES]

and we have indicted him for making mistakes, but, Judge, he made a good judgement here. "I'll 'blow him out of the water' with that cigarette." He makes that judgement. But, now, he can't "blow him out of the water" because there's no cigarette, and then he does, for the first time today, Your Honor, he does ask you to do something, and you, basically, every time, said, "Well, he didn't ask." Now, he did ask. He said, "By God, that's not fair to put that in. That's just not fair," and it isn't fair.

Now, the "man" says that we have to make a motion to see the evidence before we can make a foundation. That's not -- that's nonsense that put in that piece of proof.

Now, again, and again, where does the responsibility of the prosecution begin? Where does it? You mean that you put a witness on the stand, you're going to ask her about a cigarette, and you don't know that it's missing? You mean you don't know that, really? Now, there is nobody alive who tries a case, and who is responsible, and who doesn't say, "Well, where is the cigarette," before you go on the stand. And I know, I understand, he might have known it before he got to court. But, nobody can convince me that he didn't know it before he asked those questions, and he had a duty to

[statement continues on next Appendix page]

[Continued argument before the Court (Judge Boll) by DEFENSE-Appellant COUNSEL, MR. CATES]

come up and say, "Look, we got a faux pas here. The cigarette isn't around," and then give people a chance to think. Now, how do you handle that? What do you do? And then, the foundation makes a great deal of sense. Then you say, "Well, look, there is no way I'm going to let you get a cigarette in that isn't here. I can't defend against that. I can't defend." And I guess you can tell us that it wasn't a very significant piece of proof. But, it wasn't our proof. The significance of that proof has to be laid to the man who put it in. He decided it was significant. He decided he'd worry about the fact that it might have laid there twenty-four hours, and remember, you're among roll-your-own folks. He took that chance because he needed it, and I guess I -- when you add up all these things, and you've told us that our fellow, Strother, didn't ask, but, low and behold, this time he did, and I can't tell you that all twelve came to the opinion, but, can we say that one of them didn't, that one of them didn't say, "By God, the cigarette throws me," and I guess that's what it's all about. Can we honestly look at this record and say to ourselves the lawyers have done their job in the case of fact, that we have a society dedicated to the proposition that he's innocent, and we're not going to let him sit in jail because we didn't do the job?

[*page 110 omitted*]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Nov. 16, 1981**
Postconviction Motion Hearing by Trial Court
Numbered Below as document # **R-76**]

- [page 111] -

[continued ORAL STATEMENT &/or RULING BY THE COURT {Judge Boll} re: the cigarette butt]

When a police officer goes to the scene of an alleged offense, and they pick up evidence, they pick up a piece of evidence so that they can bring it back to their particular police department and save it, in case it can be used in the future, and there doesn't seem to me to be any question, whatsoever, that that was an error on the part of law enforcement that caused the loss of this cigarette.

Now, one of the first cases that we have is Gedicks (phonetics) versus State, 62 Wis.2d 74, and in that case, the defendant was charged with attempted arson, and the gloves used by the defendant, and the mask he had with him, and the cloth used were submitted to the crime lab for analysis. Tests were conducted, and the containers containing these items of things were left unsealed when delivered to consulting chemists, retained by the defendant, and they couldn't conduct the second vapor test because the vapors evaporated. It was an error on the part of the State, and the defense submitted that his inability to conduct his own experiments denied him a fair trial.

The Court said, "Where evidence is scientifically analyzed, and then lost, unintentionally, or in the absence of bad faith, the result of the analysis is still admissible at trial. The fact of inadvertent

[statement continues on next Appendix page]

[continued ORAL STATEMENT &/or RULING BY THE COURT [Judge Boll] re: the cigarette butt]

destruction or loss goes to the weight of the evidence, rather than to its admissibility." Now, that was the law, as I understand it, in 1974. I think that the law -- that that statement of the law is too broad.

In State v. Booth, the Court of Appeals stated, "The rule applicable to evidence destruction cases is that the defendant only show that the disposal of evidence was clearly material to the issue of guilt or innocence."

The defense also cites State v. Amundson, 69 Wis. 2d 554. In that case, the Court indicates that we should look, in one of our views of this matter, to good faith or bad faith on the part of the prosecution, and it says, **"The Augenblick and Killian cases, and the United State[s] Supreme Court, reflect that the good or bad faith of the prosecutor is a factor to be considered within the constitutional framework of whether an item of evidence has been 'suppressed' by its destruction."**

Now, in State v. Booth, the issue was what effect did it have on the results of the breathalyzer because the State had not retained the breathalyzer ampule.

The Court of Appeals, following Judge Ferris (phonetics), found that the breathalyzer ampule

[*pp. 113-114 omitted*]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Nov. 16, 1981**
Postconviction Motion Hearing by Trial Court
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[continued ORAL STATEMENT &/or RULING BY THE COURT (Judge Boll) re: the cigarette butt]

that, while the cigarette, certainly, should have been retained, that, in considering the weight that would be given to a cigarette, and considering, also, the fact that the prosecution indicates that it lost the cigarette in good faith, but didn't destroy it, that the Court should not grant a new trial on this ground.

Therefore, based on the evidence of the trial, as a whole, the Court is of the belief that this motion should be denied. The evidence at the trial was, without any question, in this Court's mind, sufficiently strong as to warrant a conviction of the defendant without this evidence whatsoever.

MR. CATES: Your Honor, I have to go because I've got something I have to try in an hour, and so I'm going to ask to leave. I haven't got anything to add but, "Me, too." But, let me make a record of "Me, too," in abstentia.

THE COURT: Rather than "Me, too," you've been great. I've enjoyed it. I've enjoyed it immensely.

MR. GARDNER: Judge, I guess I want to move on to a different area that has to do with asking you to reconsider sentencing. But, before doing that, I just want to make sure that we're both at the same point.

I believe that, although we've got

[statement continues on next Appendix page]

[Continued argument before the Court {Judge Boll} by DEFENSE-Appellant COUNSEL, MR. GARDNER]

through each individual element, that the Court has really, also, ruled on the totality of adding each one of these up together and saying that it doesn't amount to an unfair trial, and that, in the interest of justice, and everything altogether, that it would require a new trial.

THE COURT: I will say that, up until we reached the cigarette, we had, "Zero, plus zero, plus zero." Now, with the cigarette, I think we've got one. But, I don't think that zero, plus one, is sufficient, under the tests of a trial in the interest of justice, to warrant that conclusion. It's my belief that justice was not miscarried in this matter.

MR. GARDNER: Well, then --

THE COURT: In other words, if there was an error there, it's my belief that it was a harmless error.

MR. GARDNER: And my point, in making a statement, Judge, was that I don't want to waive, or miss the ability to argue that the totality is such. But, neither do I want to carry this on ad infinitum.

THE COURT: Yes, I understand that.

MR. GARDNER: Judge, I guess the next thing I want to argue had to do with the sentence of Mr. O'Rear.

[*pp. 117-126 omitted*]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Nov. 16, 1981**
Postconviction Motion Hearing by Trial Court
Numbered Below as document # **R-76**]

- [page 127] -

[Continued argument before the Court {Judge Boll} by DEFENSE-Appellant COUNSEL, MR. GARDNER]

has got a lot of good things going for him in his life, and I think he has the opportunity to do some more, and in light of our goal of trying to treat these people as equally as we possibly can for equal offenses, and with equal severity, I think Mr. O'Rear's sentence -- I think that the remainder of Mr. O'Rear's sentence should be made probationary.

THE COURT: Thank you, sir.

Mr. Antoine.

MR. ANTOINE: Your Honor, I have two comments. One doesn't go to sentencing, it goes to the argument made by Mr. Cates awhile ago regarding the cigarette evidence that was admitted and was supposed to be in the retention of Mr. Burt.

Now, I know the Court has ruled that even if that evidence was admitted, and it was error, that it was harmless error. But, if this goes to a Court of Appeals, Mr. Cates's argument was persuasive to me in that it reminded me of things that I had done at the trial, and if there is any error in my affidavit, I want to correct it now, rather than have to worry about it.

I think, upon listening to Mr. Cates's argument, that he was quite correct in saying that he would have reviewed the evidence that Mr. Burt was going

[statement continues on next Appendix page]

[Continued argument before the Court (Judge Boll) by PROSECUTING ATTORNEY, MR. ANTOINE]

to admit to before he takes the witness stand. Now, I don't have any specific recollection concerning that. However, I know, from past experience, that I go over all evidence with every witness, and I think that the point -- that at the point in time that I had knowledge that he lost that evidence, that it would have had to have been right just before he took the stand, not while he was on the stand. And for the sake of the record, and for the decision that the Court of Appeals may make in the future, that that was my decision.

THE COURT: For the reasons I gave, that that would not change the result.

MR. ANTOINE: And as to the sentencing itself, that was a very involved decision, and I am sure the Court thought about it for a long duration.

As for the State's standpoint, I do not often make a request to a court for a maximum sentence. But, I believe, in this case, I was at the maximum, or close to it, when I argued, and the whole reason I did that is, again, the severity of the crime.

* * *

[*remaining pages omitted*]

APPENDIX K

[Prior Decision - U.S. Supreme Court - 02-22-88]
[**Final Order denying certiorari** and denying a certificate of probable cause in **re: Petitioner's 1986 habeas petition** under 28 U.S.C. § 2254]
[also filed as Exb 30 to *Coram* Petition App. AA, *infra*]
[as also recorded at:
484 U.S. 1078, 108 Sup.Ct.1058, 98 L.Ed.2d 1020]

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

February 22, 1988

Mr. Terry J. O'Rear
Wisc. Inmate No. 123826
P.O. Box 7203
Madison, WI 53707-7203

Re: Terry J. O'Rear,
v. Attorney General of Wisconsin
No. 87-1170

Dear Mr. O'Rear:

The Court today entered the following order in the above entitled case:

The application for certificate of probable cause addressed to Justice Brennan and referred to the Court is denied. The petition for a writ of certiorari is denied.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk
[*signed: Joseph F. Spaniol, Jr.*]

APPENDIX L

[Prior Decision by Justice Stevens of This Court]
[December 3, 1987]
[**Order denying a certificate of probable cause re: Petitioner's 1986 habeas petition** under 28 U.S.C. § 2254]
[also filed as Exb 27 to *Coram* Petition App. AA, *infra*]

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

December 4, 1987

Mr. Terry J. O'Rear
No. 123826
P.O. Box 7203
Madison, WI 53707-7203

Re: Terry J. O'Rear v. Attorney General of Wisconsin, A-372

Dear Mr. O'Rear

Your application for a certificate of probable cause in the above-entitled case has been presented to Justice Stevens, who has endorsed thereon the following:

"Denied
John Paul Stevens
12/3/87"

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By [*signed: Edward L. Turner Jr.*]
Edward L. Turner, Jr.
Assistant Clerk

cc: Hon. Donald J. Hanaway, Attorney General

APPENDIX M

[Prior Decision by Justice Stevens of This Court]
[November 18, 1987]
[Preliminary Order calling for a response to Petitioner's application for a certificate of probable cause re: Petitioner's 1986 habeas petition under 28 U.S.C. § 2254]
[also filed as Exb 26 to *Coram* Petition App. AA, *infra*]

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

November 18, 1987

Barry M. Levenson, Esquire
Assistant Attorney General
Department of Justice
P.O. Box 7857
Madison, WI 53707

Re: Terry J. O'Rear v. Attorney General of Wisconsin, A-372

Dear Mr. Levenson:

Justice Stevens has directed this office to call for a response to the application for a certificate of probable cause in the above-entitled case.

An original and two copies of the response, together with proof of service upon opposing counsel are to be received in this office by noon on Tuesday, December 1, 1987.

Your response should address the jurisdiction question and the merits of the petition.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk
By Edward L. Turner, Jr.
Assistant Clerk

cc: Mr. Terry J. O'Rear
Inmate No. 123826
P.O. Box 7203; Madison, WI 53707-7203

APPENDIX N

[Decision Below - USCA 7 - 08-12-87]
[**Order on Rehearing re: Petitioner's application for a certificate of probable cause** re: Petitioner's 1986 habeas petition under 28 U.S.C. § 2254]
[also filed as Exb 24 to *Coram* Petition App. AA, *infra*]

[page 1 of 1]

United States Court of Appeals
For The Seventh Circuit
Chicago, Illinois 60604

August 12, 1987

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. JOHN L. COFFEY, Circuit Judge

TERRY J. O'REAR, Petitioner-Appellant,	Petition for a Certificate of Probable Cause from the United States District Court for the Western District of Wisconsin
No. 87-1513 vs.	
ATTORNEY GENERAL OF THE STATE OF WISCONSIN, Respondent-Appellee.	**No. 86-C-934** JOHN C. SHABAZ Judge.

ORDER

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court dismissed the petition and declined to issue a certificate of probable cause. Petitioner was subsequently denied a certificate of probable cause by this Court.

Petitioner has now filed a petition for a rehearing on the denial of a certificate of probable cause. This court again has carefully reviewed the final order of the district court and the record on appeal. We still find no substantial showing of the denial of a federal right; the petitioner has failed to demonstrate he should prevail on the merits, the issues raised are debatable among jurists, the court could resolve the issues differently, or the questions deserve further proceedings. Barefoot v. Estelle, 463 U.S. 880, 893 n. 4 (1983). Accordingly,

IT IS ORDERED that the request for a rehearing is DENIED.

APPENDIX O

[Decision Below - USCA 7 - 05-14-87]

[Order on Request for Certificate of Probable Cause re: Petitioner's 1986 habeas petition]

[also filed as Exb 22 to *Coram* Petition App. AA, *infra*]

U. S. Court of Appeals For The Seventh Circuit
Chicago, Illinois 60604
May 14, 1987
Before
Hon. WILLIAM J. BAUER, Chief Judge
Hon. JOHN L. COFFEY, Circuit Judge

TERRY J. O'REAR, Petitioner-Appellant	Appeal from the United States District Court for the Western District Court of Wisconsin
No. 87-1513 vs. ATTORNEY GENERAL OF THE STATE OF WISCONSIN, Respondent-Appellee.	No. 86 C 934 John C. Shabaz, Judge

ORDER

Petitioner filed for a writ of habeas corpus, 28 U.S.C. § 2254. The district court dismissed the petition and declined to issue a certificate of probable cause.

Petitioner has now filed an application for a certificate of probable cause. This court has carefully reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a federal right; the petitioner has failed to demonstrate that he should prevail on the merits, that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. Barefoot v. Estelle, 103 S. Ct. 3383, 3394 n. 4 (1983). Accordingly, the request for a certificate o[f] probable cause is DENIED.

APPENDIX P

[Decision Below - U.S.D.A. - W.D. Wisc. - 03-27-87]
[**Order on Request for Certificate of Probable Cause** re: Petitioner's 1986 habeas petition]
[also filed as Exb 20 to *Coram* Petition App. AA, *infra*]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TERRY J. O'REAR,
Petitioner,

ORDER

v.

86-C-934-S

ATTORNEY GENERAL OF THE
STATE OF WISCONSIN,
Respondent.

Petitioner's petition for a writ of habeas corpus was dismissed on March 4, 1987. On March 26, petitioner submitted a notice of appeal and a request for certificate of probable cause, and paid the $70 filing fee.

Having reviewed again the petitioner's claims, the Court concludes that his claims are without merit. Therefore, the Court certifies that petitioner's appeal is not taken in good faith, and will not grant a certificate of probable cause.

ORDER

IT IS ORDERED that petitioner's request for a certificate of probable cause is DENIED.

Entered this 27th day of March, 1987.

BY THE COURT:

[*signed: John C. Shabaz*]
JOHN C. SHABAZ
District Judge

APPENDIX Q

[Decision Below - U.S.D.C. - W.D. Wisc. - 03-04-87]
[**Final Order & Decision Dismissing Habeas Petition**]
[also filed as Exb 17 to *Coram* Petition App. AA, *infra*]

[Page 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TERRY J. O'REAR, Petitioner,	)	
v.	)	ORDER 86-C-934-S
ATTORNEY GENERAL OF THE STATE OF WISCONSIN, Respondent.	)	

Petitioner filed a petition for a writ of habeas corpus on December 31, 1986 challenging his January 1981 conviction for second degree sexual assault and false imprisonment even though he is no longer in custody pursuant to this conviction. An order to show cause why this writ should not issue was entered on January 12, 1987. Respondent filed a motion to dismiss on February 3, 1987 and petitioner filed a responsive pleading on February 24, 1987. Petitioner also filed a motion to disregard the respondent's motion to dismiss and a motion to reconsider this Court's decision that his second claim was not meritorious. Petitioner's motion to disregard the respondent's motion to dismiss must be denied. The Court finds that the respondent's motion was not filed in bad faith.

[Page- 2-]

Petitioner has filed a motion to reconsider this Court's January 12, 1987 decision that his petition for a writ of habeas corpus was not

"constructively" filed on August 14, 1985 when he requested the forms from the clerk's office. The Court finds that obtaining forms cannot be considered to be initiating any type of court action. Many litigants request forms and never file cases. Furthermore, since petitioner had exhausted his state remedies in March 1983, he had two years to file his petition prior to August 1985. The Court again finds petitioner's claim to be without merit and will deny petitioner's motion for reconsideration.

FACTS

Petitioner Terry J. O'Rear was convicted of second degree sexual assault and false imprisonment on January 8, 1981 in Dane County Circuit Court. He was discharged early from his sentence of conviction on August 22, 1985. He filed this petition for a writ of habeas corpus on December 31, 1986.

CONCLUSIONS OF LAW

Petitioner contends that even though he has been released from his sentence he is still in constructive custody because of the general collateral consequences of his

conviction and because of restraints on his movements. He argues that he cannot obtain his Ph.D. degree in Comparative Politics because he cannot travel abroad to complete his research. Respondent argues that this court does not have jurisdiction pursuant to 28 U.S.C. § 2254 because petitioner is not "in custody" within the meaning of the statute.

The United States Supreme Court has held that "custody" as used in 28 U.S.C. § 2254 is not limited to actual physical restraint but may include other significant restraints on personal liberty such

as conditions of parole, Jones v. Cunningham, 371 U.S. 236 (1963), or bail release on personal recognizance, Hensley v. Municipal Court, 411 U.S. 345 (1973). In a more recent case, Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984), the Court held again that bail release on personal recognizance did constitute custody within the meaning of 28 U.S.C. § 2254.

In Carafas v. LaVallee, 391 U.S. 234 (1968), the United States Supreme Court held that, where a petitioner had filed a petition for a writ of habeas corpus while incarcerated and was then released from his sentence, the release did not moot his petition because of the collateral consequences. The United States Supreme Court has not addressed habeas corpus jurisdiction in a case where the petitioner has been unconditionally released from his sentence at the time the petition is filed.

In Harvey v. South Dakota, 526 F.2d 840 (8th Cir. 1976), cert. denied, 426 U.S. 911 (1976), the Eighth Circuit Court of Appeals found that a petitioner who had been unconditionally released from his sentence is not subject to severe and immediate restraints and is therefore not "in custody." In this case, Harvey contended he was unable to pursue certain professions or possess a firearm.

In Hanson v. Circuit Court of First Judicial Circuit, 591 F.2d 404 (7th Cir. 1979), cert. denied, 444 U.S. 907 (1979) held that the collateral consequences flowing from a fine-only conviction were not severe enough to constitute custody within the meaning of 28 U.S.C. § 2254. The Seventh Circuit Court of Appeals has not addressed habeas corpus jurisdiction in a case where a petitioner has been released from a prison sentence before filing a petition for a writ of habeas corpus.

Petitioner contends that in Carafas v. LaVallee,

supra, the Court held that collateral consequences of a conviction establish custody. However, this Court does not agree and finds that the Court held that a release from sentence after a petition is filed does not moot the petition because of the collateral consequences. Petitioner O'Rear's case is distinguishable because he did not file the petition while he was incarcerated or on parole.

[Page - 5 -]

Petitioner argues that even though he was released from his sentence prior to filing his petitions [sic] the collateral consequences are so severe as to constitute custody. He attempts to distinguish his case from both Hansen [sic] and Harvey, supra. He states that his collateral consequences are more severe than consequences flowing from the fine-only conviction found not to be custody by the Seventh Circuit Court of Appeals in Hanson. This may be true, but collateral consequences of a conviction do not constitute custody after the petitioner has been released from sentence.

Conviction of a felony may deprive one of certain civil rights such as the right to vote, the right to hold public office, the right to serve on a jury, the right to possess any kind of firearm and the loss of those other valuable rights of which the petitioner complains.

This Court finds the Harvey v. South Dakota, 526 F.2d 840 (8th Cir. 1976), cert. denied 426 U.S. 911 (1976) to be persuasive. In Harvey the Court found that a petitioner who was not able to pursue certain professions or possess a firearm after an unconditional release from a three-year prison sentence for grand larceny was not in custody for purposes of a petition for a writ of habeas corpus.

Although petitioner argues that his case can be distinguished from Harvey, the Court is not

convinced. The Court

[Page- 6 -]

finds that the collateral consequences of petitioner's conviction do not subject him to severe and immediate restraints. Petitioner is not in custody within the meaning of 28 U.S.C. § 2254. The respondent's motion to dismiss must be granted because this Court does not have jurisdiction in this case.

ORDER

IT IS ORDERED that petitioner's motion to reconsider and motion to not consider respondent's motion to dismiss are DENIED.

IT IS ORDERED that respondent's motion to dismiss the petition is GRANTED.

IT IS FURTHER ORDERED that this petition for a writ of habeas corpus is DISMISSED.

Entered this 4th day of March, 1987.

BY THE COURT

[signed John C. Shabaz]
District Judge

APPENDIX R

[Decision Below - U.S.D.C. - W.D. Wisc. - 01-12-87]
[**Preliminary "Show Cause" Order** re: habeas petition]
[also filed as Exb 16 to *Coram* Petition App. AA, *infra*]

[Page 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TERRY J. O'REAR,
Petitioner,

ORDER

v.

86-C-934-S

ATTORNEY GENERAL OF
THE STATE OF WISCONSIN,
Respondent.

On December 31, 1986, petitioner filed this petition for a writ of habeas corpus and paid the filing fee. He is challenging his January 1981 conviction for second degree sexual assault and false imprisonment.

Petitioner alleges that he was discharged early from his sentence of conviction on August 22, 1985. Therefore, he is no longer in the custody of the State of Wisconsin pursuant to this conviction.

Petitioner argues that he is still in constructive custody because of the collateral consequences of the conviction. Although the Court is not convinced this argument is meritorious, the Court will allow the respondent to respond before reaching its decision.

Petitioner's argument that this petition should issue because he took steps to file the petition while he was on parole but did not do so is without merit.

It is possible that petitioner could prove he is still in custody pursuant to 28 U.S.C. § 2254, and that this custody is unconstitutional.

Accordingly,

ORDER

IT IS ORDERED that the respondent shall file and serve upon petitioner a response to this petition not later than twenty (20) days from the date of service of this petition, showing cause, if any, why this writ should not issue. Affidavits may accompany the response. Petitioner may have twenty (20) days from the service of the response to file and serve upon counsel for respondent a traverse to the allegations of the response submitted by the respondent. Affidavits may accompany the traverse. Such affidavits shall raise no issues which have not already been raised in the petition and response. Affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served and filed therewith.

Entered this 12th day of January, 1987.

BY THE COURT:

[*signed: John C. Shabaz*]
JOHN C. SHABAZ
District Judge

APPENDIX S

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States

[Here are set forth, successively, excerpts from: the Fifth, Sixth and Fourteenth Amendments of the Constitution.]

Amendments to the United States Constitution

Fifth Amendment.

... No person shall...be deprived of life, liberty, or property, without due process of law;...

Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right...

[*confrontation clause*:]
to be confronted with the witnesses against him;

[*compulsory process clause*:]
to have compulsory process for obtaining witnesses in his favor,

[*assistance of counsel clause*:]
and to have the Assistance of counsel for his defense.

Fourteen Amendment. Section 1.

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Statutes

[Here are set forth, successively, Sections 1257(a) and 1651 of Title 28 of the United States Code.]

28 U.S.C. Section 1257 (a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. Section 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

APPENDIX T

[Here is set forth a **Brief Guide to other Attached Documents showing where the FEDERAL QUESTION was raised and passed on in the Courts below]**
[Attached to today's Petition as an appendix as per Supreme Court Rule 14.1(h).]

I. *At the trial Court Level in 1981:*

A. *Where the Federal Question was raised by the Petitioner in 1981:*

In accordance with Wis. State Stats., § 974.02 & 809.30, Petitioner's appeals process began when his appellate attorneys filed a "notice of motions & motions for post-conviction relief" (reprinted *infra*, App. U: pp. 80-81a) and a "brief in support of motions for post conviction relief" (relevant portions thereof are reprinted *infra*, App. V: 82-89a) with the original trial judge (the Honorable James C. Boll). **It is the common practice in Wisconsin for the grounds underlying a particular motion to be set forth in the accompanying brief rather than in the text of the motion itself (in accord with Wis. State Stats., § 809.14; 809.19(e); 802.01(2); & 809.30).**

Attorney Gardner specifically wrote: "in the case law, two standards appear...The first is explicitly based on due process, and is controlled by federal constitutional law" (*infra*, App. V: 84a). He then went on to cite a Wisconsin case [**Tucker v. State**, (1978), 84 Wis.2d 630, 267 N.W.2d 630] which pointed out how federal case law, specifically **U.S. v. Agurs**, 427 US 97, 112 (1976), takes precedence over Wisconsin state law when "'omitted evidence creates a reasonable doubt that did not otherwise exist...'" (*Id.*) As This Court made especially clear in **Agurs**, 427 US at 107 the question concerned is the "Due Process Clause of the Fifth Amendment to the Constitution...[and] the comparable Clause in the Fourteenth Amendment applicable to trials in state courts." After this review, Attorney Gardner then

discussed the second standard involved in the case - "fairness of the trial" - again pointing out that Wisconsin case law was based on federal case law (*Id*), here particularly noting **Napue v. Illinois**, 360 US 264 (1959). Later in his brief (App. V: 88a), Mr. Gardner raised "[t]he Sixth Amendment to the United States Constitution" in discussing how the prosecuting attorney's failure to disclose the facts surrounding the 'lost' [*sic*] evidence affected the trial defense attorney's ability to confront and cross-examine State witness Officer O'Donohue.

B. *Where the Trial Court initially passed on the Federal Question in 1981:*

The fact that the federal question was directly before the trial court (Judge Boll) regarding the evidence in question, is found in the trial court's conclusions of law and findings of fact, orally given and transcribed, at the Postconviction Motion Hearing of 11-16-81, (R76:94-5, 102-3, 111-6 & 128; see App. J, pp. 41-44a, 51-54a, & 56a). There the Trial Court judge affirmed that in cases of evidence destruction or loss he took his guidance from the Wisconsin supreme court in "**State v. Amundson**, 69 Wis.2d 554" [230 NW2d 775, (1975)], which, in turn, took its guidance from "[t]he **Augenblick** and **Killian** casse, and the United State[s] Supreme Court," especially when considering the "constitutional framework of whether an item of evidence has been 'suppressed' by its destruction." R76:112; App. J: 52a, *supra*.

The fact that the Trial Court was passing on a federal, not a state, question is further revealed when one examines the relevant portions of **State v. Amundson** to which the Trial Court referred. Those relevant portions are reprinted *infra*, App W: 90-93a. As is indicated in **Amundson** (App W; 90a), the Wisconsin supreme court began its discussion of suppression of evidence with reference to This Court's 1963 decision in **Brady v. Maryland**, 373 U.S. 83 at 87 and to the case which applied the edicts of **Brady** to the state of Wisconsin, namely **Nelson v.**

State (1973), 59 Wis.2d 474, 479, 208 N.W.2d 410. **Brady** clearly was concerned with "the Due Process Clause of the Fourteenth Amendment" when discussing prosecutorial misconduct and nondisclosure. 373 U.S. at 86.

Next, the Wisconsin court in **Amundson**, (App W: 92-3a) moved on to review **United States v. Augenblick**, (1969) 393 U.S. 348, and **Killian v. United States**, (1961) 368 U.S. 231. In discussing suppression of evidence in **Augenblick**, This Court brought up the "command of the Sixth Amendment that criminal defendants have compulsory process to obtain witnesses in their defense," but then felt that that particular case was "not a worthy candidate" for further review on those grounds. 393 U.S. at 356. Likewise, in the case of Mr. John J. **Killian**, an alleged Communist party organizer in Madison, Wisc. [368 U.S. at 236], the issue of "due process of law" was raised [368 U.S. at 241] by the petitioner but not concluded on those grounds by This Court [368 U.S. at 242-44, *passim*].

II. *At the initial Appellate Court Level in 1982:*

A. *Where the Federal Question was raised by the Petitioner in 1982:*

Following the denial of post-conviction relief by the original trial court and in accordance with Wis. State Stats., § 974.02, 808.03(1) & 809.30, petitioner's appellate attorneys filed a "notice of appeal" (reprinted *infra*, App. X: 94a) and a "supporting appeals brief" (portions thereof are reprinted *infra*, App. Y: 95-98a) with the Wisconsin Court of Appeals, District IV. Therein, for example, Messrs. Cates & Garner again pointed out (App Y: 96a) that in **Nelson v. State** (*supra*) the Wisconsin court was extending the FEDERAL constitutional guarantees regarding "rules of disclosure," to citizens of Wisconsin [noted in **Brady** (*supra*, 373 U.S. at 86) as stemming from the 14th Amendment]. The attorneys then went on to discuss how the "**Nelson/Brady** rule of disclosure"

was clarified by This Court in **Agurs** (*supra*).

Another example of how the federal question was raised, occurred when (at App Y: 97a) the attorneys specifically discussed the suppression of evidence in terms of **State v. Amundson** (*supra*; see App. W, *infra*) and **State v. Booth**, 98 Wis.2d 20, 995 NW2d 194 (1980), wherein the Wisconsin courts specifically based their reasoning upon the federal principles outlined by This Court in **Brady** and **Agurs**.

B. *Where the Federal Question was raised by the Respondent in 1982:*

In response, the Respondent (by Attorney General LaFollette & Asst. Atty General Heikenen) filed a 'response brief' (portions thereof are reprinted *infra*, App. Z: 99-101a). Therein the respondent opened with a discussion of "due process," as noted in **Brady**, *supra*, 373 U.S. at 87 and "clarified" by **Agurs** ,*supra*, in reference to the same "suppressed evidence" that remains the issue at hand today. (Although, at that time, the Respondent kept the truth of their 'destruction' of evidence from the Courts and falsely presented the evidence as 'lost'). However, the federal Constitutional claim of "due process" was paramount in the State's discussion.

C. *Where the Appellate Court passed on the Federal Question in 1982:*

In the State appellate court's opinion, rendered on 12-12-82, (App. G: 22-35a, *supra*), the court, when reviewing the "lost" [*sic*] evidence issue, cited **Amundson's** (App. W, *infra*) reliance on This Court's ruling in **Brady** (*supra*); and, thereby, the appeals court also established that they were considering, or passing upon, a *federal* due process claim:

> **Amundson** dealt with evidence...destroyed by police...The **Amundson** court noted that prosecutorial suppression of exculpatory evidence violates due process regardless of the prosecution's good faith. **Brady v. Maryland**, 373 U.S. 83, 87 (1963); **Nelson v. State**, 59 NW 2d

474, 479, 208 N.W.2d 410, 412 (1973).

State v. O'Rear, No. 82-809-CR, slip op. at 6 (Wis.Ct. App., Dec. 13, 1982); reprinted *supra* at App. G, p. 26).

III. *At the Trial Court Level via Coram Nobis* :

A. *Where the Federal Question was raised by the Petitioner*

1. Before the Original Judge in 1989:

On Oct. 23, 1989 Petitioner filed a "Petition for a Writ of Error Coram Nobis" (reprinted in App. AA: 102-22a, *infra*) and an accompanying 'supporting brief' (excerpts reprinted in App. BB: 123-29a, *infra*). This filing was based upon the fact that Your Petitioner had finally discovered that the State had kept the true disposition of the evidence hidden from Your Petitioner, his attorneys and the federal and Wisconsin court systems. The State had, in fact, destroyed the evidence prior to trial and failed to reveal it. In these documents the dominance of the federal question of "due process of law" as established by the rulings of This Court is readily apparent; especially via references to "due process" as established in **Arizona v. Youngblood** 488 U.S.51 (1988), **California v. Trombetta**, 467 U.S. 479 (1984) & **Giles v. Maryland**, 386 U.S. 66 (1967) (See e.g. App. BB: 123-5a). These cases clearly deal with the federal/constitutional "due process clause" and specifically with the following Amendments to the Constitution: 14th (**Youngblood**, 488 U.S. at 52 - relevant portions reprinted in App. CC: 130-4a, *infra*); 14th & 6th (**Trombetta**, 467 U.S. at 485 & 486, nt. 6 - relevant portions reprinted in App. DD: 135-39a, *infra*) & 14th (**Giles**, 386 U.S. at 74 & 98).

2. Before the Replacement Judge in 1990:

In Petitioner's brief in response to Respondent's Motion to Quash, (*infra*, App EE; 140-41a) Your Petitioner specifically directed the attention of the

replacement judge to the "more detailed review of the law [made in] Petitioner's Brief in Support of Petition for a Writ of Error Coram Nobis at pp. 22-24," which had been presented to the original trial judge, who had resigned. (These referenced pages are reprinted and attached hereto at App. BB: 126-28a, *infra*). Again, at page 8 of said response brief presented to Judge Torphy (App. EE: 141a), Petitioner specifically referred to the standards regarding the destruction of evidence established by **Amundson** (*supra*; reprinted in App. W, *infra*) which, as noted above (at p. 76a), stem directly from the rulings of This Court. And, at the Oral Hearing of 12-12-90 before Judge Torphy, the federal question was again put before the replacement judge; particularly when the **Giles** case (*supra*) was cited by Petitioner's attorney as establishing that the "State has a constitutional duty to correct false testimony" - here the unmistakable inference is that this is a federal "constitutional duty" (App. FF: 148a *infra*).

B. *How the lower Court passed on the Federal Question in 1989-91:*

The original trial judge granted the Writ of Error Coram Nobis (App. F, *supra*). However, the replacement judge, citing no case law, statutory or other legal basis, granted the Respondent's Motion to Quash the Writ. (App. D & E, *supra*).

IV. *At the Appeals Court Level via Coram Nobis :*

A. *Where the Federal Question was raised by the Petitioner in 1991:*

In accordance with applicable Wisconsin state law, Your Petitioner's attorney filed an appeal with the Wisconsin court of appeals for the fourth district. Here, too, the domination of the federal question formed the basis of Your Petitioner's continued claims made in his appellate brief (relevant portions thereof reprinted *infra*, App. GG: 154-6a). For example, the attorneys again based their claim upon

violations of "due process" by the prosecution and referred to the rulings of This Court in **Youngblood** (*supra*) and **Giglio v. U.S.**, 405 U.S. 150 (1972). The latter being based upon "rudimentary demands of justice" [405 U.S. at 153] as established by The Constitution. And, in Petitioner's Reply Brief of 08-05-91, [at App. HH: 158a, *infra*], Petitioner's attorney again underlined that the issue at hand was a "fair trial" as established by the rulings of This Court in **Giglio** (*supra*) and **Napue** (1959, *supra*).

B. *How the Appeals Court passed on the Federal Question in 1992:*

By applying the 'law of the case doctrine' the Majority opinion avoided all discussion of the federal question. However, the dissenting opinion addressed the federal question squarely and found federal constitutional error in the initial trial. (For a fuller discussion, see today's Petition text at pp. 6-7 *supra*, and see the Opinion at App. A, pp. 1-14a, *supra*)

V. *At the Discretionary High Court Level via Coram Nobis in 1992* :

A. *Where the Federal Question was raised by the Petitioner before the Wisconsin Supreme Ct* :

Your Petitioner's attempt to achieve discretionary review at the Wisconsin supreme court level was also based on the fact that the case involved a "significant question of federal constitutional law" (See App II: 159-61a, *infra*).

B. *How Wisconsin high court passed on the Federal Question in 1992:*

The Wisconsin Supreme Court declined discretionary review. (See App. B: 15a, *supra*).

APPENDIX U

[This document is presented as per S.C. Rule 14.1(h) **SOLEY so as TO ESTABLISH how the FEDERAL QUESTION was RAISED in the State Courts BELOW** THEREFORE, Here is set forth excerpts from the Document filed **Sept. 29, 1981** with the original trial court - Dane County (State of Wisc.) Circuit Court, Branch 6 (Judge J.C. Boll): **Motion for New Trial**]

[page 1]

STATE OF WISCONSIN — CIRCUIT COURT BRANCH VI — DANE COUNTY

STATE OF WISCONSIN,
Plaintiff,
-vs-
TERRY J. O'REAR,
Defendant.

Case No. 80CF14

NOTICE OF MOTIONS AND MOTIONS FOR POST CONVICTION RELIEF

TO: Donald Antoine
Assistant District Attorney
Office Of The District Attorney
Dane County Courthouse
210 Monona Avenue
Madison, Wisconsin 53709

PLEASE TAKE NOTICE that at a time set by the court the Honorable James C. Boll presiding in his courtroom at the City-County Building, Madison, Dane County, Wisconsin, the defendant, Terry J. O'Rear, by his attorneys Lawton & Cates, will make the following motions:

MOTION FOR NEW TRIAL

The defendant, by Lawton & Cates, his attorneys, upon all of the files, records, and proceedings herein and pursuant to sec. 974.02 Wis. Stats. and Hayes v. State, 46 Wis. 2d 93, 125 N.W.2d 625 (1970), respectfully moves the court for entry of an order setting aside the judgment of conviction entered against defendant and for a new trial.

As grounds, defendant asserts:

1. That the prosecution failed to disclose exculpatory evidence

[page 2]

or evidence which might have led to exculpatory evidence which it had in its possession, custody, or control or which it, by the exercise of due diligence, should have been discovered and disclosed. Specifically, the prosecution failed to disclose the following facts:

a) That Nina Tuman had engaged in consentual sexual intercourse with an individual other than the defendant within 72 hours of the alleged rape.

b) The name of the individual described in subsection (a) above.

c) The fact that Nina Tuman had in her possession a bottle of "Rush" on the night in question, the physical characteristics of said bottle and its contents, and the place of its purchase.

d) That the hair samples obtained from the defendant, Terry J. O'Rear, were unsuitable for scientific analysis.

e) That the cigarette butt allegedly found at the scene of the alleged rape had been lost and would not be produced at trial.

2. That the Judgment is based upon an error of law. Specifically, that is was prejudicial error not to strike from the record all testimony concerning the missing cigarette butt.

3. That the interests of justice require a new trial.

MOTION TO MODIFY SENTENCE

* * *

[page 3]

Dated this 29 day of September, 1981.

LAWTON & CATES

By: [signed: James W. Gardner]
James W. Gardner * * *
Attorneys for Defendant

APPENDIX V

[This document is presented as per S.C. Rule 14.1(h) **SOLEY so as TO ESTABLISH how the FEDERAL QUESTION was RAISED in the State Courts BELOW** THEREFORE, Here is set forth excerpts from the Document filed **Oct. 22, 1981 with the original trial court** - Dane County (State of Wisc.) Circuit Court, Branch 6 (Judge J.C. Boll) in re: **Case No. 80-CF-14 - STATE v. O'REAR - Brief in Support of Motion for New Trial/Postconviction Relief]**

[page 1]

INTRODUCTION

* * *

Subsequent to the sentencing, Mr. O'Rear filed motions for Post Conviction Relief. This brief is submitted in support of those motions.

ARGUMENT

I. A NEW TRIAL MUST BE GRANTED BECAUSE THE PROSECUTIONS FAILURE TO DISCLOSE EXCULPATORY EVIDENCE DEPRIVED TERRY J. O'REAR OF A FAIR TRAIL.

A. Introduction.

During the course of pretrial proceedings in this lawsuit, two formal documents were filed by George Strother requesting the discovery and disclosure of exculpatory evidence or information which might lead to exculpatory evidence. Mr. Strother was Mr. O'Rear's previous attorney. The documents which were filed on February 29, 1980, were a Notice of Motion and Motion For Discovery and a Demand For Discovery and Inspection.

In addition to the formal requests for exculpatory evidence listed above, questioning at the preliminary hearing on January 28, 1980, was intended to discover exculpatory evidence. Specifically, on pages 31-35 of the preliminary

transcript, the complaining witness, Ms. Nina Tuman, denied the use of drugs such as "Rush" during the night in question. Additionally, during the preliminary hearing,

[page 2 - **emphasis added**]

the prosecutor's objections prevented the answering of questions intended to elicit the fact that Ms. Tuman had engaged in consentual sexual intercourse the evening proceeding the alleged rape and the name of the man involved. (Transcript pp. 51-54.)

In spite of the requests for exculpatory material detailed above, the prosecution failed to disclose the following factual information:

a. That Nina Tuman had engaged in consentual sexual intercourse with an individual other than the defendant with 72 hours prior to the alleged rape.

b. The name of the individual described in subsection (a) above.

c. The fact that Nina Tuman had in her possession a bottle of "Rush" on the night in question, the physical characteristics of said bottle and its contents, and the place of its purchase.

d. That the hair samples obtained from the defendant, Terry J. O'Rear, were unsuitable for scientific analysis.

e. **That the cigarette butt allegedly found at the scene of the alleged rape had been lost and would not be produced at trial.**

With the exception of the information contained in paragraph (a) above, all of these exculpatory facts were in the exclusive control of the prosecution and its witnesses. The prosecution's failure to disclose them deprived the defendant, Terry J. O'Rear, of a fair trial.

B. <u>The Prosecution's Conduct Failed To Meet The Applicable Legal Standards For Disclosing Exculpatory Information.</u>

1. Both due process and fairness of the trial require that if there is a serious doubt that the trial was fair or a reasonable doubt which might have been raised by the nondisclosure, there must be a new trial.

[page 3 - **emphasis added**]

In the case law, two standards appear and are used almost interchangeably by appellate courts **concerning nondisclosure by the prosecution. The first is explicitly based on due process, and is controlled by federal constitutional law.** Thus in Tucker vs. State, 84 Wis. 2d 630, 267 N.W.2d 630 [,637] (1978), the court observed that **if the Wisconsin rule** that a new trial is called for where the evidence "would in reasonable likelihood have altered the judgment of the jury" **was in some tension with the rule from US vs. Agurs, 427 US 97 (1976), the Agurs rule would control:**

> "... if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." (Agurs at 112.)

The Wisconsin Court and the Federal Courts also use a standard of the fairness of the trial. Thus, the Wisconsin Court of Appeals based its decision to order a new trial (overturned on other grounds) in Rohl vs. State, 90 Wis. 2d 18, 279 N.W.2d 722, 279 N.W.2d 731 ( ) on the **following rational from Napue vs. Illinois, 360 US 264 (1959):**

> "That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing as it did, a trial that could in any real sense be termed fair." (Rohl at 37).

Similarly, although the **Seventh Circuit** ostensibly based its decision to grant a new trial on its supervisory powers rather than on more fundamental, due process grounds, it grounded out on the necessity for a fair trial:

"We think Poole's burden of showing prejudice on appeal, as distinguished from the burden in collateral proceedings, is satisfied by the serious doubt we have that he received a fundamentally fair trial, free from prejudice." **US vs. Poole, 379 F2d 645 [,648] (1967).**

* * *

[page 9]

C. The States Failure To Disclose Exculpatory Evidence Unfairly Tainted The Trial.

1. The states failure to disclose exculpatory evidence deprived the defendant of the ability to present evidence which could have established reasonable doubt.

* * *

[page 17]

* * *

D. A New Trial Is Required Because During Final Argument The State Unfairly Benefited From Its Failure To Disclose Exculpatory Evidence.

* * *

[page 19 - **emphasis added**]

* * *

E. In Sum, The State Breached Its Broad Duty To Reveal Evidence Which In Fairness Requires A New Trial.

The duty of the prosecutor to disclose exculpatory evidence in light of his advantages in the access to evidence and resources to analyze that evidence, **is necessary to a fair trial.** It begins before trial, requiring revelation of evidence which would have a material effect on trial preparation **(US vs. Donatelli, 484 F2d 505 [, 507-8] (1st Cir 1973)),** and continues through the trial as inferences from evidence develop. When the State fails in this duty, a new trial is required. The point of requiring a new trial is not to punish society, but to **avoid an unfair trial (US vs. Marrero, 516 F2d 12 [,14](7th Cir**

1975)). The standard under which the impact of a particular prosecutorial suppression or silence may require a new trial is fairly low: **the government has a constitutional duty "to reveal evidence which might lead the jury to entertain a reasonable doubt** about defendant's guilt." **Marrero, supra.** Here the State did not even approach meeting this duty. Therefore, fairness and justice require this court to order a new trial.

[page 20 - **emphasis added**]

II. THE ADMISSION OF TESTIMONY CONCERNING THE **LOST CIGARETTE BUTT** CONSTITUTES PREJUDICIAL ERROR WHICH REQUIRES THE GRANTING OF A NEW TRIAL.

On January 6, 1981, Deputy Sheriff Mary Jo O'Donohue testified for the prosecution. The substance of Officer O'Donohue's testimony was that she found what she believed to be a self-rolled cigarette butt at the scene of the alleged rape. She discovered this alleged evidence on January 3, 1980, more than 24 hours after the alleged rape. The cigarette butt was never placed into evidence. It had inexplicably been lost sometime between January 3, 1980 and January 6, 1981. The defendant didn't know of the loss until Officer O'Donohue was cross-examined. (January 6, 1981, pp. 60-64).

Attorney Strother did not object to the testimony concerning the cigarette at the time it was given. He did, however, move to strike from the record all testimony concerning it at the close of the State's case. This motion was denied. (January 7, 1981, pp. 30-31). The failure to strike from the record all testimony concerning the cigarette butt was prejudicial error which can only be remedied by the granting of a new trial.

The State of Wisconsin has codified its evidence code. The overriding purpose of the rules of evidence as so codified is "... to secure fairness ... to the end that the truth may be ascertained and

proceedings justly determined." Section 901.02 Wis. Stats. The admission of the testimony concerning the cigarette butt deprived O'Rear of the fair proceeding which the statute says we seek.

As has been stated previously in this brief, the present case turned upon the credibility of two people, Terry O'Rear and Nina Tuman. _____ [page 21 -**emphasis added**] Ms. Tuman described an event which O'Rear denied ever occurred. The testimony concerning the cigarette butt was the only piece of independent corroboration to the most crucial elements of Ms. Tuman's story. It placed both individuals at the scene of the alleged rape. It put Terry J. O'Rear at a place he had denied being. Obviously, the effect of this evidence was prejudicial to the defense. It was devastating.

Clearly, the testimony concerning the cigarette butt was relevant; however, not all relevant evidence is admissible. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...". Section 904.03 Wis. Stats. Independent Milk Producers Co-Op vs. Stoffel, 102 Wis. 2d 1, 289 N.W.2d 102 (1981). Here the unfair prejudicial nature of this evidence outweighs its probative nature.

The testimony as presented denied the defendant all realistic ability to defend. He couldn't say that the cigarette butt wasn't one which was self-rolled. He couldn't say that it was made with different tobacco or different paper than that which he used. All the defendant could do was deny his presence at the scene. Obviously, the failure to present the cigarette butt was prejudicial.

The fact that the prosecutor didn't disclose the cigarette butt was missing was also prejudicial. It deprived the defense and the court of the opportunity to have the admissibility issue considered on the basis of a thoughtful reasoned analysis. It allowed the jury to hear the evidence before the defect was disclosed. At best, the motion

to strike only gave the court the opportunity to attempt to cure a defect.

[page 22- **emphasis added**]

Additionally and very importantly, the failure to disclose deprived the defendant of his right to effective assistance of counsel. **The Sixth Amendment to the United States Constitution guarantees the right of counsel to criminal defendants. "It has long been recognized that the right to counsel is the right to effective assistance of counsel." McMann vs. Richardson, 397 US 759, 771 n. 14 (1970).** Part of being an effective trial lawyer is being prepared. **The failure to disclose meant Attorney Strother couldn't properly prepare to either cross-examine on or argue about the issue of the missing cigarette butt.** Therefore, it was prejudicial error not to strike the testimony.

The prejudicial and unfair nature of the testimony is accentuated by the uses to which the District Attorney put it in closing argument. He argued that if it hadn't been lost, the State could have scientifically shown it was O'Rear's. One can only surmise why the State didn't attempt to run the scientific tests sometime in the year between discovery and trial.

He also argued that the disappearance gave the defense an unfair advantage in that it allowed O'Rear to testify that it wasn't his without fear of contradiction. This argument is the pinnacle of unfairness. **It's the State benefiting from its own negligence. O'Rear didn't loose the cigarette.** He didn't fail to test it. **Yet, he is being pilloried for exercising his constitutional right to defend himself. The prosecutor could only make this argument because he had gained an unfair and prejudicial advantage through the courts failure to grant defendant's motion to strike the questioned testimony.** Only the granting of a new trial can rectify this miscarriage of justice.

[page 23]

III. THE INTERESTS OF JUSTICE REQUIRE THAT THE COURT GRANT TERRY J. O'REAR A NEW TRIAL.

* * *

[page 26]

* * *

IV. THE DEFENDANT'S CONVICTION MUST BE REVISED BECAUSE SECTION 940.225(2) WIS. STATS. IS UNCONSTITUTIONAL ON ITS FACE AND THEREFORE A NULLITY.

* * *

[page 27 - **emphasis added**]

* * *

V. CONCLUSION.

For the reasons stated within the body of this brief, Terry J. O'Rear must be granted a new trial. **The record herein establishes that the initial trial wasn't fair.** The only way this wrong can be remedied is for the Court to order a new trial.

Dated this 22nd day of October, 1981.

LAWTON & CATES

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Attorneys for Defendant

APPENDIX W

[This document is presented as per S.C. Rule 14.1(h) **SOLEY so as TO ESTABLISH how the FEDERAL QUESTION was RAISED in the State Courts BELOW** THEREFORE, Here is set forth **excerpts from** the following case of the Wisconsin State supreme court: **State v. Amundson, 69 Wis.2d 554, 577-79, 230 N.W.2d 775, 787-89 (1975)**, which was cited repeatedly by the Courts and by both the Respondent & Petitioner Below]

[Pages: 69 Wis.2d at 577; 230 N.W.2d. at 787 **- emphasis added]**

* * *

The rule is well recognized that *suppression* by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or innocence, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland, supra*, 373 U.S. page 87, 83 S.Ct. 1194; *Nelson v. State* (1973), 59 Wis.2d 474, 479, 208 N.W.2d 410; *Britton v. State* (1969), 44 Wis.2d 109, 118, 170 N.W.2d 785. The evidence so suppressed must be exculpatory. *Lampkins v. State, supra*, 51 Wis.2d pages 575, 576, 187 N.W.2d 164. Even where the evidence is material to guilt or innocence and exculpatory, a new trial is only required where the evidence would in reasonable likelihood have altered the result. *State v. Calhoun, supra*, 67 Wis.2d p. 215, 226 N.W.2d 504; *Nelson v. State, supra*, 59 Wis.2d p. 486, 208 N.W.2d 410. Thus, in a *suppression* case, the good faith or bad faith of the prosecutor is not alone decisive, and because the evidence is readily available for inspection by the court, the primary concerns are materiality and the exculpatory nature of the evidence as limited by the doctrine of harmless error.

The issue of whether, in an evidence *destruction* case, the defendant must show

[page N.W.2d 788]
that the evidence was exculpatory was raised in ***United States v. Bryant*** **(1971), 142 U.S.App.D.C. 132, 439 F.2d 642, and resolved in an eminently reasonable fashion.** That case also involved a narcotics' sale and a tape of the conversation between defendants and a narcotics' agent which was destroyed prior to trial. Under the circumstances of that case, the defendants' involvement in the drug sale could only be established by proof of what was said during the taped conversation and the agent's testimony was the key to the government's case. The circuit court reasoned that if the defendants were required to show that the destroyed tape was exculpatory - an impossible task- the prosecution could easily subvert the purpose of the *Brady Case* by destroying rather than suppressing exculpatory evidence:

> **". . . Were *Brady* and its progeny applicable only when the exact content of the non-disclosed materials was** [page Wis.2d 578] **known, the disclosure duty would be an empty promise, easily circumvented by suppression of evidence by means of destruction rather than mere failure to reveal. . . ." *United States v. Bryant, supra*, page 648.**

We find the reasoning of the circuit court in *United States v. Bryant, supra*, persuasive. It is concluded, therefore, that the inability of the defendant to show that the destroyed evidence was exculpatory does not alone defeat the claim that its destruction and nondisclosure by the prosecution denied the defendant due process of law given the showing that the evidence was clearly material to the issue of guilt or innocence.

The *Bryant Case* introduced the consideration of bad faith on the part of the prosecution in relying on the rationale that destruction of evidence might be used as a tool to circumvent the *Brady* suppression rule. **In the *Brady Case*, a violation of**

due process was found irrespective of good or bad faith. In holding that the degree of good or bad faith by the prosecution can be considered in the determination of whether a sanction should be imposed in an evidence destruction case, **the circuit court in the *Bryant Case* relied upon *United States v. Augenblick* (1969), 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed.2d 537.**

The *Augenblick Case* involved a collateral attack by two sailors to their court martial convictions. The evidence destroyed in that case were tapes of the interrogation of the defendants by naval personnel. **In holding that the defendants' constitutional rights had not been violated, the Supreme Court noted that the tapes had not been "suppressed," presumably meaning in bad faith**, as the record established that the Navy had made an "earnest effort" to locate the tapes and had a routine method of handling and using such recordings, despite the fact that the ultimate fate of the tapes remained a mystery. ***United States v. Augenblick, supra*, pages 355, 356, 89 S.Ct. 528. *See also: Killian v. United States* (1961), 368 U.S. 231,** 82

[page - Wis.2d 579]

S.Ct. 302, 7 L.Ed.2d 256, rehearing denied, 368 U.S. 979, 82 S.Ct. 476, 7 L.Ed.2d 441. (Interim notes taken to transfer data to final written report destroyed in good faith in accord with normal practice shows no violation of defendant's rights to due process.)

On the other hand, some courts when faced with an issue with regard to destruction of evidence material to the defense have followed the strict suppression case rule that the good or bad faith of the prosecution has no bearing on whether the defendant has been denied due process of the law. *See, e.g., **United States v. Heath*** **(D.C.Hawaii 1957), 147 F.Supp. 877, appeal dismissed (9th Cir. 1958),** 260 F.2d 623; *Trimble v. State* (1965), 75 N.M. 183, 402 P.2d 162* [**See: Burns, Judicial Response to Governmental Loss or Destruction of Evidence*, 39 Univ. of Chicago Law Rev. 542 (Spring, 1972).]

The *Augenblick* and *Killian Cases* reflect that the good or bad faith of [page - N.W. 2d 789] **the prosecutor is a factor to be considered within the constitutional framework** of whether an item of evidence has been "suppressed" by its destruction. Moreover, in an individual case, the good or bad faith of the state in destroying the evidence could reflect on the value and importance of the evidence. **The burden of producing the evidence or of explaining why it could not do so, falls on the government. *United States v. Augenblick, supra*, 393 U.S. page 355, 89 S.Ct. 528.** This is consistent with this court's holding in *Wold v. State, supra*, which **places on the prosecution the duty of obtaining all evidence subject to disclosure in the possession of the state's investigatory agencies of which the prosecution has knowledge, or by the exercise of due diligence, should have discovered.**

* * *

APPENDIX X

[This document is presented as per S.C. Rule 14.1(h) **SOLEY so as TO ESTABLISH how the FEDERAL QUESTION was RAISED in the State Courts BELOW** THEREFORE, Here is set forth the Document filed **Nov. 23, 1981** with both the (State of Wisconsin) Circuit Court (Br. 6) and the Court of Appeals, 4th Dist.: **Formal Notice (Motion) of Appeal]**

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 6	DANE COUNTY

STATE OF WISCONSIN,
Plaintiff-Respondent
-vs.- **Case No. 80-CF-14**
TERRY J. O'REAR, NOTICE OF APPEAL
Defendant-Appellant

TO: Clerk of Circuit Court
Dane County Courthouse
210 Monona Avenue
Madison, WI 53709

Dane County District Attorney
210 Monona Avenue
Madison, WI 53709

NOTICE IS HEREBY GIVEN that Terry J. O'Rear appeals to the Court of Appeals, District 4, from the Order entered from the bench on November 16, 1981, in Dane County Circuit Court, Branch 6, Honorable James C. Boll presiding, Case No. 80-CF-14, wherein the Court denied defendant's Motions for a New Trial and Motion to Modify Sentence.

This is not an appeal within Section 752.31(2), Wis. Stats.

[November 23, 1981]

LAWTON & CATES
By: [*Signed James W. Gardner*]
James W. Gardner * * *
Attorneys for Defendant-Appellant

APPENDIX Y

[This document is presented as per S.C. Rule 14.1(h) **SOLEY so as TO ESTABLISH how the FEDERAL QUESTION was RAISED in the State Courts BELOW** THEREFORE, Here is set forth excerpts from the Document filed **March 22, 1982** with the (State of Wisconsin) **Court of Appeals,** District IV, in re: **Case no. 82-809-CR - STATE v. O'REAR - Brief of Defendant-Appellant in Support of Appeal]**

[page -1 -]

ISSUES PRESENTED FOR REVIEW

1. Did the admission into evidence of testimony offered by the State which concerned a piece of physical evidence which the State inexplicably lost prior to trial constitute reversible error?
Answered "No" by the Trial Court.

2. Was Terry J. O'Rear denied a fair trial because of the State's failure to disclose exculpatory information within its exclusive possession and control?
Answered "no" by the Trial Court

* * *

[page -3-]

* * *

Thereafter, motions for post-conviction relief were brought on for hearing before the Trial Court. These motions were denied by the Court after argument on November 16, 1981. Thereafter, this appeal was taken.

* * *

[page -10-]

ARGUMENT

I. The Admission Of Testimony Concerning The Lost Cigarette Butt Constitutes Prejudicial Error Which Requires The Granting Of A New Trial.

* * *

II. A New Trial Must Be Granted Because The State's Failure To Disclose Exculpatory Evidence Deprived Terry J. O'Rear Of A Fair Trial.

A) Wisconsin Law Requires That A New Trial Be Granted Herein If The Suppressed Evidence Could Have Affected The Outcome Of The Trial.

In Nelson v. State, 59 Wis.2d 474 208 NW2d 410 (1973) the Wisconsin Supreme Court interpreted Brady v. Maryland, 373 US 83 83 S.Ct. 1194 (1963) to mean that the State had an affirmative duty to disclose material within its possession or control which tended to negate the guilt of the defendant or reduce his punishment. The Nelson Court held that the duty of disclosure extended to the situation where the evidence went only to the credibility of a witness. Furthermore, the Court held the disclosure should be made by the State if there was any room for doubt as to whether the material would be useful to the defense. Nelson supra, pp. 481-484. In order to trigger the State's disclosure duty, Nelson required that the defense request the evidence.

The Nelson/Brady rule of disclosure left many questions unanswered. These questions were dealt with on a piece meal basis until the United States Supreme Court re-examined the problem. In US v. Agurs, 427 US 97 S.Ct. 2392 (1976) the Court identified three categories of nondisclosure and three accompanying standards of materiality. After Agurs, if the undisclosed evidence was material under the applicable standard, a new trial is required. The three Agurs categories and standards are as follows:

* * *

[page -28- **emphasis added**]

III. A New Trial Is Necessary Because **The State Failed To Either Produce Crucial Evidence Which Might Have Been Exculpatory Or To Explain Why That Evidence Was No Longer Available.**

As pointed out above, Deputy Mary J. O'Donohue allegedly found a self-rolled cigarette butt at the scene of the supposed assault. Sometime in the intervening year prior to trial, it was lost. The fact of the loss was not disclosed to the defense until Ms. O'Donohue's cross-examination. No testimony was ever presented which explained the loss.

The Wisconsin Court has adopted the reasoning of the DC Circuit concerning evidence which is not "suppressed" but is destroyed in the sense that it is no longer available. In State v. **Amundson, supra**, and in State v. Booth, 98 Wis. 2d 20 295 NW2d 194 (1980), the question of destroyed evidence was contrasted with merely unrevealed evidence, and the Courts concluded that the reasonableness of the Brady and Agurs requirement that the defendant must show that the nondisclosed evidence was exculpatory "disappears where the nondisclosed evidence is destroyed." Booth at 25. **The Amundson court observed:**

> ". . . if the defendants were required to show that the destroyed tape was exculpatory -- an impossible task -- **the prosecution could easily subvert the purposes of the Brady** case by destroying rather than suppressing exculpatory evidence." **Amundson at 577.**

Thus, both the question of the good or bad faith of the prosecutor, and the question of whether the loss is explained, enter into the determination of whether in lost or destroyed evidence cases, a new trial is necessary:

* * *

[page -30-]

IV. The State's Failure To Disclose The Results Of The Second Crime Laboratory Test Was Error Which Requires A New Trial.

* * *

[page -31-]

* * *

V. A New Trial Must Be Granted Because The Defendant's Conviction Is Based Upon False Testimony.

* * *

[page -33-]

VI. Justice And Fairness Both Require That Terry J. O'Rear Be Granted A New Trial.

* * *

[page -40-]

CONCLUSION

For the reasons stated within the body of this brief, the conviction should be reversed and a new trial granted. . . .

Dated this 22nd day of March, 1982.

LAWTON & CATES

By: [*signed: James W. Gardner*]
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Attorneys for Defendant

APPENDIX Z

[This document is presented as per S.C. Rule 14.1(h) **So as TO ESTABLISH how the FEDERAL QUESTION was RAISED in the State Courts BELOW** THEREFORE, Here is set forth excerpts from the Document filed **May 3, 1982** with the (State of Wisconsin) **Court of Appeals,** District IV, in re: **Case no. 82-809-CR - STATE v. O'REAR - Brief of Plaintiff-RESPONDENT in Opposition to Appeal]**

[page -2-- **emphasis added**; footnotes omitted]

At trial Officer O'Donohue testified to finding a hand-rolled cigarette butt in the parking lot of the Speedway Bar (71:62). On cross-examination the officer testified that the butt could no longer be located (71:63). At the post-conviction motion t**he trial court found** that the law enforcement officers lost this evidence (76:111), but t**hat the loss was in "good faith" (as opposed to intentional destruction)** (76:115). The defendant claims error based on the loss of this physical evidence, and based on Officer O'Donohue's testimony.

I**n Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady was subsequently clarified**

[page -3- **emphasis added**]

in United States v. Agurs, 427 U.S. 97 (1976), wherein the Supreme Court required that the materiality of suppressed evidence be examined in light of the entire record to determine whether its non-disclosure denied the defendant a fair trail.

Since Brady, courts in many jurisdictions have

considered the peculiar problems involved when the government has lost or destroyed evidence, rather than suppressed it as in Brady. Those courts have noted that it may be impossible for a defendant to demonstrate the exculpatory nature of evidence no longer in existence. **See United States v. Bryant, 439 F.2d 642 (D.C. Cir..1971).** In evidence destruction cases those courts have also recognized that the good faith or bad faith of the government should be considered. * * *

.The Wisconsin courts have also addressed the issue of evidence destruction in a variety of contexts.

* * *

[page -5- **emphasis added**]

Amundson . . .. * * * **In denying the defendant's claim, the court looked to** the value of the evidence destroyed, the **absence of bad faith in its destruction**, and the other evidence of guilt. 69 Wis. 2d at 576, 580. In short, **because of the absence of bad faith** in the tape's destruction, its importance was realistically evaluated in the context of the entire case to determine whether a fair trial had been denied. Cf. Agurs, 427 U.S. 97.

* * *

[page -7- **emphasis added**]

First, **the trial court found that the state lost the cigarette in "good faith"** (76:115). **The defendant has the burden on this appeal of demonstrating that this finding is "against the great weight and clear preponderance of the evidence."** Amundson, 69 Wis. 2d at 580. **The defendant has failed to meet that burden.**

* * *

There was no testimony that the cigarette the officer found was the defendant's. There was no testimony

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[page -8-]

that it was rolled with the defendant's brand of paper, or contained the defendant's brand of

tobacco. There was no testimony indicating the condition of the cigarette, whether it was soaked or dry, or whether the officer believed that it had been lying there for an hour, a day or a month. There was no testimony regarding how many other cigarette butts were lying in the parking lot, or whether the officer made any attempt to look for other hand-rolled cigarettes after finding the one in question.

* * *

[page 22]

CONCLUSION

* * *

[May 3, 1982]

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APPENDIX AA

[This document is presented **IN PART** as per S.C. Rule 14.1(h) **So as TO ESTABLISH how the FEDERAL QUESTION was RAISED in the State Courts BELOW** THEREFORE, Here is set forth the Document filed **October 23, 1989 with the original trial court** - Dane County (State of Wisc.) Circuit Court, Branch 6 (Judge J.C. Boll): **PETITION FOR WRIT OF ERROR CORAM NOBIS** with its appendices' index]

[page 1]

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

TERRY J. O'REAR,
Petitioner

-vs- **CASE NO. 89 CV 5909**

STATE OF WISCONSIN, James C. Boll
Respondent. Circuit Court, Br. 6

PETITION FOR WRIT OF ERROR CORAM NOBIS

Now comes the Petitioner, Terry J. O'Rear, by his attorneys Lawton & Cates, S.C., by John H. Bowers and H. Arleen Wolek, and petitions the Court for the issuance of a Writ of Error Coram Nobis, and ultimately a judgment thereon as follows:

1. Terry J. O'Rear was the Defendant in State of Wisconsin v. O'Rear, Case No. 80 CF 14, and he was convicted of one count of second degree sexual assault in violation of sec. 940.225(2)(a), Wis. Stats., and one count of false imprisonment in violation of sec. 940.30 Wis. Stats., on January 8, 1981. Mr. O'Rear was convicted by a jury of twelve persons following a two-day trial.

2. No piece of evidence underlying the conviction conclusively or positively established either that the complainant, Ms. Nina Tuman, was sexually assaulted or that Mr. O'Rear was the perpetrator of the assault, if an assault indeed occurred.

3. This conviction rested on: a) misrepresentations by the State concerning alleged

evidence which was the only "evidence" potentially linking Mr. O'Rear to the scene of the alleged crime

[page 2]

as well as the only potentially independent corroboration of Ms. Tuman's claims; and b) the credibility of Ms. Tuman's claim of sexual assault versus Mr. O'Rear's claim that he and Ms. Tuman never had any sexual contact.

4. The events out of which this case arose occurred on the first and second of January 1980. A summary of the events, as testified to at the trial or as documented in proceedings subsequent to trial, include the following:

a. The Petitioner and the complainant were patrons at the Headliners Bar in Madison, Wisconsin beginning on the evening of January 1, 1980. They had arrived separately and had not previously met one another. (R71, p.8-10; R72, p.63 and 65)

b. At about 1:00 a.m. on January 2, 1980, while Mr. O'Rear was playing an electronic game, the complainant watched him, spoke with him, and invited him to a party at the residence of a friend of hers. While at the Headliners Bar, Ms. Tuman admittedly drank two to three beers. (R.71, p.9-11; R72, p.65-66)

c. En route to the party in Mr. O'Rear's car, Ms. Tuman admittedly shared a marijuana cigarette. (R71, p.13) According to Mr. O'Rear and another passenger in the car, Ms. Tuman also inhaled a drug known as "Rush," a/k/a butyl nitrite (R72, p.42 & 69) which is generally used to prolong the subjective sensation of orgasm or to give a feeling of disinhibition or giddiness. (R61, Addendum to Exh G). Ms.

[page 3]

Tuman denied using "Rush," but subsequently admitted possessing a brown vial of

"room odorizer" that produced a "rushing sensation." (R71, pp.54, 101-102 and 115-116). While at the party, Ms. Tuman admittedly drank an unknown quantity of beer. (R-71, p.15). Mr. O'Rear claimed that in addition to her beer consumption at the party, Ms. Tuman smoked marijuana and inhaled "Rush." (R72, p.76-77). She denied use of the latter two substances at the party. However, she admitted that her bottle of "Rush" was openly present and a "bong" pipe for marijuana usage was in open view at the party. (R71,p.34 & 54)

d. The party ended between 3:00-4:00 a.m. When it ended, Ms. Tuman, who was visiting from Chicago, Illinois, opted to have Mr. O'Rear transport her to the friend's house where she was staying rather than return to that house with her friend and two other males. (R71, p.19; R72, p.78) The plan was for Mr. O'Rear to follow the car containing Ms. Tuman's friends.

e. The trip to Ms. Tuman's destination required Mr. O'Rear to drive on the West Beltline to the Gammon Road exit. The road was wet and icy; Mr. O'Rear's vehicle skidded; and thereafter, could not follow the other car. Having passed the Gammon Road exit due to the unforeseen skid, he drove to the next available exit, Mineral Point Road, and exited there. (R72, p.79-80)

[page 4]

f. At this point, after making a right turn onto Mineral Point Road heading eastbound in order to get back to Gammon Road, Mr. O'Rear testified that he pulled over at the top of an entranceway to a drive-in movie theater. There, Mr. O'Rear got out of the car for fresh air to enable him to become more alert, exercised, re-entered the car, smoked a cigarette, talked with Ms. Tuman, exchanged

addresses and telephone numbers with her, put the cigarette out in the car ash tray, and ran around the car a second time for further alertness. He then drove Ms. Tuman to her friend's house, went home, and spoke with his roommate, which his roommate confirmed. (R72, p.46-49 & 80-82) Ms. Tuman admitted to having given Mr. O'Rear her accurate Chicago telephone number. (R71, p.51).

g. By contrast, Ms. Tuman claimed Mr. O'Rear turned left onto Mineral Point Road, headed westbound, and drove into the Speedway Bar parking lot, where he sexually assaulted her and penetrated her both vaginally and anally. (R71, p.20-25 & 43-44) While she alleged Mr. O'Rear did not hit, grab or strike her, and that she was not directly physically threatened, she claimed that he said she might get hurt if she didn't cooperate. (R71, p.22 & 46-47). Ms. Tuman did not explicitly identify the exact location in the parking lot where the assault allegedly occurred. She claimed Mr. O'Rear drove her to her friend's house after the alleged assault. Thereafter, while admitted to the house by

[page 5]

another woman, she told no one of the alleged assault; but instead, showered and went to bed. (R71, p.48-49) She did not report the alleged assault to police authorities until approximately five hours after she awakened (eight to nine hours after the claimed event). (R71, p.49)

5. Ms. Tuman claimed Mr. O'Rear used a white glove to clean her vaginal area after he ejaculated. (R71, p.26-27). A white glove was never found even though state officials testified they searched for one. (R71, p. 83-84)

6. Hair samples were obtained from Mr.

O'Rear and, despite the fact that the samples were obtained by a physician from Methodist Hospital in the presence of Deputy Kretschman, the State claimed the samples were unsuitable for scientific analysis, without ever issuing reasons for its claim. (R72, p. 11).

7. Ms. Tuman testified that at the time of the alleged sexual assault, her vaginal opening was very tight, very dry, and that Mr. O'Rear kept "ramming" her for about five minutes before penetrating her after which time he continued "ramming" her. (R71, p. 25) This testimony suggests that her genitalia should have, at minimum, been red, tender, and swollen.

8. A physical examination conducted on Ms. Tuman after she reported the alleged assault produced no findings to support her accusation of sexual assault. The findings of that physical examination revealed Ms. Tuman was neither agitated nor distressed. She had no lacerations nor bruises. Her genitalia

[page 6]

were normal and there were no anal lesions. The wet mount slides were negative. (R61, Exh. C). These facts never reached the jury. Even though the prosecutor listed the doctor who conducted the examination of Ms. Tuman and his assisting nurse as witnesses for the prosecution, and even though the prosecutor privately told the Court and defense counsel at the end of the first day of trial that he would call both witnesses before he rested his case the following day (R71, p. 127-128; R61, Exh. E, p.2), neither the doctor, the nurse, nor the medical report itself, were discussed, presented, or introduced before the jury.

9. The crime lab obtained "inconclusive" results to their tests. The crime lab expert testified that the lab results revealed possible traces of semen (R72, p.15), but such traces could not be scientifically linked to Mr. O'Rear, and it is possible they

could have resulted from consensual sexual intercourse that Ms. Tuman admitted to having engaged in with an unnamed man on December 31, 1979, the night before the events which are the subject of this case allegedly occurred. (R73, p.121). Because this consensual sexual activity was within the scientifically recognized 72-hour time period within which semen traces can be readily found, any stains not scientifically linked to Mr. O'Rear could likely be those of the unnamed man.

10. Mr. O'Rear had smoked "hand-rolled" cigarettes during the period of time he was with Ms. Tuman, but the complainant never testified that he smoked any cigarettes (hand or machine

[page 7]

rolled) when she claimed they were in the Speedway Bar parking lot.

11. Deputy Sheriff Mary Jo O'Donohue testified that during the middle of the night on January 3, 1980, more than 24 hours after the assault allegedly occurred, she went to the Speedway Bar parking lot, at the direction of Deputy Sheriff Robert Dreifke, to look for a "hand-rolled" cigarette butt. She testified she found a cigarette butt which she believed was from a "hand-rolled" cigarette while she was at this parking lot. (R71, p.60-61).

12. Deputy Sheriff O'Donohue claims she found the alleged cigarette butt despite the fact that there was inclement weather during the intervening period between the time of the alleged assault and the alleged discovery of the "hand-rolled" cigarette. These weather conditions consisted of rain, high winds, and temperature fluctuations that caused the moisture to freeze at night and melt during the day. There were also many cars that had entered and exited the Speedway Bar parking lot during the intervening period between the time of the alleged assault and the alleged discovery of the "hand-rolled" cigarette. (R76, p.91) However, these facts were never presented to the jury.

13. The "hand-rolled" cigarette butt allegedly discovered by Deputy Sheriff O'Donohue was the only piece of physical evidence linking Mr. O'Rear to the scene of the alleged assault.

14. The State never sent the alleged cigarette butt to the crime lab for scientific analysis. (R71, p.62)

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15. On February 29, 1980, Attorney George Strother, who represented Mr. O'Rear at trial, filed a motion in which he demanded that the State provide him with information about all physical evidence the State intended to introduce at trial so that he could file appropriate motions. (R14.) Attorney Strother also demanded that the State produce any and all exculpatory evidence available to it or in its custody, so that he could inspect, copy or photograph such evidence. (R13).

16. Prior to trial, the State never informed Attorney Strother that the alleged "hand-rolled" cigarette butt would not be available to introduce into evidence at trial.

17. The cigarette butt was never placed into evidence; and at trial, the State claimed it inexplicably "lost" the "hand-rolled" cigarette butt. (R71, p.61-62; See R76, p.102 also) This inexplicable loss was not disclosed until after Deputy Sheriff O'Donohue was cross-examined and after she had already testified for the State that she found a "hand-rolled" cigarette butt at the alleged crime scene.

18. There was no testimony that anyone other than Deputy Sheriff O'Donohue ever saw the alleged "hand-rolled" cigarette butt.

19. Failure to produce the allegedly "lost" cigarette butt at trial deprived the defense of the opportunity to cross-examine that evidence. For example, the defense was deprived of the opportunity to examine whether the alleged cigarette butt came from a "hand-rolled" cigarette or whether it contained the

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unique type of imported European tobacco Mr. O'Rear used. Additionally, the defense was deprived of the opportunity to have the jury view the alleged evidence and make a determination for itself as to whether the cigarette butt was "machine-rolled", whether it contained a filter, or whether it was "hand-rolled."

20. As a result, Attorney Strother did all that he could do after such testimony was already before the jury by moving to strike all testimony concerning the cigarette butt from the record. That motion was denied. (R72, p.30-31)

21. Mr. O'Rear was convicted on the questionable evidence discussed above on January 8, 1981. (R74, p.29, 31-32) He was held without bond in the Dane County jail until his sentencing on April 27, 1981, when he was sentenced to a term of imprisonment not to exceed six years on the second degree sexual assault conviction, with a concurrent one year term on the false imprisonment conviction. (R75, p. 148-149)

22. Thereafter, Mr. O'Rear retained Lawton & Cates, S.C. to represent him and attorneys Richard L. Cates and James W. Gardner filed motions for post-conviction relief.

23. Pursuant to the motions for post-conviction relief, Assistant District Attorney Donald L. Antoine filed an affidavit in which he represented under oath that the State was not aware until trial that the alleged hand-rolled cigarette butt was not available to introduce into evidence because it was "lost." (R67, para. 8)

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24. The motions for post-conviction relief were denied by the Dane County Circuit Court after oral argument on November 16, 1981. (R76, p. 115).

25. According to the Court, while there was error in admitting testimony regarding the alleged "hand-rolled" cigarette butt at trial, a significant reason why the Court found this error to be "harmless" (R76, p.116) and the reason it denied Mr. O'Rear's motion for post-conviction relief was:

> [T]he Court is of the belief that, while the cigarette, certainly should have been retained, that, in considering the weight that would be given to a cigarette and considering, also, the fact that the prosecution indicates that it lost the cigarette in good faith, but didn't destroy it, that the Court should not grant a new trial on this ground. (Emphasis supplied.) (R76, p.115)

26. The petitioner, through Lawton & Cates, S.C., by Attorneys Gardner and Cates, filed an appeal of the above ruling with the Wisconsin Court of Appeals and it was denied on December 13, 1982. (Exhibit 11 attached)

27. A petition for review was submitted to the Supreme Court of the State of Wisconsin on January 11, 1983 (Exhibit 12 attached) and the Court denied the petition on March 9, 1983. (Exhibit 13 attached)

28. On May 26, 1983, Mr. O'Rear was released from prison on an early earned parole based on good behavior while in prison. (Exhibit 14 attached)

29. Following his release from prison, Mr. O'Rear sought habeas corpus relief. The time period involved in filing his petition for a writ of habeas corpus was lengthy because, due to

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economics, Mr. O'Rear was now representing himself; and therefore, had to teach himself how to research substantive and procedural law when he was not working to earn income to support himself.

30. In August 1985, Mr. O'Rear met with

officers of the U.S. District Court for the Western District of Wisconsin to discuss formalizing his pro se petition which he was ready to file. Shortly after that meeting, Mr. O'Rear attended his regular tri-monthly meeting with his parole officer on August 22, 1985, when he first learned that he was discharged early from the sentence of conviction because of his excellent behavior while on parole. The discharge had been signed on August 7, 1985, but the discharge did not become effective until it was presented to Mr. O'Rear on August 22, 1985. Mr. O'Rear had neither petitioned for nor requested the early discharge.

31. The unexpected discharge, which Mr. O'Rear learned about 15 days after the discharge papers were signed, prevented him from submitting his petition for a writ of habeas corpus at a time when he was in "parole custody." Given the new legal complications concerning jurisdictional and custodial matters following his release, it then became essential for Mr. O'Rear to engage in further legal research to best present his case for habeas corpus relief.

32. Mr. O'Rear filed his pro se petition for a writ of habeas corpus with the U.S. District Court for the Western District of Wisconsin on December 31, 1986. (Case No. 86 C-934-S.

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(Exhibit 15 attached) He presented three arguments wherein he asserted entitlement to habeas corpus relief because his liberties were still severely restricted.

33. On January 12, 1987, the U.S. District Court issued a preliminary "show cause" Order upon the State of Wisconsin and allowed Mr. O'Rear the right to traverse the State's response. (Exhibit 16 attached)

34. On March 4, 1987, the U.S. District Court denied Mr. O'Rear's petition on the grounds that it did not have jurisdiction in the case because it found

Mr. O'Rear was not "in custody" within the meaning of 28 U.S.C. 2254. (Exhibit 17 attached)

35. On March 26, 1987, Mr. O'Rear appealed the U.S. District Court's decision by filing a Notice of Appeal to the U.S. Seventh Circuit Court of Appeals. (Exhibit 18 attached) He perfected his appeal by also filing a Motion for a Certificate of Probable Cause from the U.S. District Court. (Exhibit 19 attached)

36. On March 27, 1987, the U.S. District Court denied the Certificate of Probable Cause. (Exhibit 20 attached)

37. On April 8, 1987, Mr. O'Rear applied for a Certificate of Probable Cause with the U.S. Seventh Circuit Court of Appeals as Case No. 87-1513. (Exhibit 21 attached)

38. On May 14, 1987, the U.S. Seventh Circuit Court of Appeals denied the Certificate of Probable Cause. (Exhibit 22

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attached) Consequently, Mr. O'Rear could not proceed with his appeal pending before the U.S. Seventh Circuit Court of Appeals.

39. On May 27, 1987, Mr. O'Rear filed a Petition for Rehearing of his Application for a Certificate of Probable Cause, with the U.S. Seventh Circuit Court of Appeals in which he requested a rehearing en banc. (Exhibit 23 attached)

40. On August 12, 1987, the U.S. Seventh Circuit Court of Appeals denied Mr. O'Rear's request. (Exhibit 24 attached)

41. On November 6, 1987, Mr. O'Rear appealed the U.S. Seventh Circuit decision by filing an Application for the Issuance of a Certificate of Probable Cause, as Case No. A-372, with U.S. Supreme Court Justice Stevens, who is the Circuit Justice for the Seventh Circuit Court of Appeals. (Exhibit 25 attached)

42. On November 18, 1987, Justice Stevens ordered the State of Wisconsin to make a formal response to Mr. O'Rear's Application. (Exhibit 26

attached)

43. Following the State's response, Justice Stevens denied Mr. O'Rear's Application on December 3, 1987. (Exhibit 27 attached)

44. On January 9, 1988, Mr. O'Rear filed a Petition for a Writ of Certiorari, as Case No. 87-1170, with the United States Supreme Court to appeal the Seventh Circuit Court of Appeals ruling that denied him a Certificate of Probable Cause. (Exhibit 28 attached)

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45. On January 13, 1988, Mr. O'Rear requested that his Application for a Certificate of Probable Cause be resubmitted to U.S. Supreme Court Justice Brennan. This letter was filed in the U.S. Supreme Court on January 21, 1988. (Exhibit 29 attached)

46. On February 22, 1988, the U.S. Supreme Court denied both the Application for a Certificate of Probable Cause and the Petition for a Writ of Certiorari. (Exhibit 30 attached) Thus, appellate review in the federal judicial system was denied based solely on the finding that Mr. O'Rear was no longer "in custody" within the meaning of 28 U.S.C. 2254, as referenced in paragraph 34 above. The substantive merits of Mr. O'Rear's appeal of his conviction were never reviewed.

47. After he was denied federal habeas corpus relief, Mr. O'Rear, still asserting his innocence in the alleged sexual assault and false imprisonment, again approached Attorney Richard L. Cates at Lawton & Cates, S.C. because he had read that DNA testing could be performed on evidence up to ten years after an alleged assault to conclusively determine whether a particular named defendant was the perpetrator of a sexual assault, if there was a sexual assault.

48. On May 10, 1988, Mr. Edward Grosse, an investigator for the law firm of Lawton & Cates, S.C., conducted an investigation at the Dane County

Sheriff's Department and at the State of Wisconsin Crime Laboratory to determine if any evidence might still be available on which to conduct DNA testing. No evidence

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remained in the Dane County Sheriff's evidence room. (Affidavit of Ed Grosse, Exhibit 31 attached)

49. Pursuant to the May 10, 1988 investigation, Mr. Grosse discovered a card at the Dane County Sheriff's office which indicated that the alleged "hand-rolled" cigarette butt, tag number 34420, was not dated when it was put into the Dane County Sheriff's Department evidence room and it was "destroyed" on August 21, 1980, more than four months before trial. The card contained the initials of Lt. Darrell Lien. (Exhibit 32 attached)

50. Mr. Grosse also learned from the Dane County Sheriff's Department that a pair of blue socks, tag number 33574, belonging to the complainant was destroyed on August 21, 1980, the same date that the alleged "hand-rolled" cigarette butt was destroyed. (Exhibits 31 & 32 attached)

51. On May 16, 1988, Mr. Grosse spoke with Lt. Darrell Lien at the Dane County Sheriff's Department. Lt. Lien was the property or evidence officer in August 1980, when the alleged hand-rolled cigarette butt and the blue socks were destroyed. Lt. Lien told Mr. Grosse that it was his belief that the only reason an item such as the cigarette butt would have been destroyed prior to trial was because someone decided it had no value as a piece of evidence in the case or that it would not be used as evidence in a given case. (Exhibit 31, Affidavit of Edward Grosse)

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52. Given Lt. Lien's statement and the fact that the blue socks and the alleged "hand-rolled" cigarette butt were both destroyed on the same date strongly affirms that both items were intentionally

destroyed by the State.

53. The evidence that Mr. Grosse discovered on May 10 and 16, 1988 indicates that the State not only intentionally destroyed the cigarette butt, but that the State also intentionally misrepresented the cigarette butt as "lost" rather than "destroyed" both at trial and during subsequent appellate proceedings. In the alternative, a strong inference is created that the State was not forthright in its representation at trial and at the post-conviction hearing as to what happened to the alleged cigarette butt and the reason it was not introduced into evidence.

54. Lt. Lien's statement, that evidence is only destroyed prior to trial if it contains "no value" to the case, explains without ambiguity why the State destroyed the alleged hand-rolled cigarette butt, if it ever existed in the first place. Under the situation cited by Lt. Lien, the State must first have determined that the butt had no value and either that a) the cigarette butt was insignificant because it would not corroborate or support the State's allegations against Mr. O'Rear; or b) it was of negative value as it was either unidentifiable as a hand-rolled cigarette butt or it was not hand-rolled. Under the former premise if an actual hand-rolled cigarette butt existed and had been found at the Speedway Bar parking lot, it would have been unique and it

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would have corroborated an essential element of the offense, i.e. it would have placed Mr. O'Rear at the scene of the alleged crime. Since a real cigarette butt would corroborate the State's allegations, it would not have been destroyed. Therefore, the former premise is unlikely. Under the latter premise, however, if the alleged cigarette butt was not ascertainable as hand-rolled, production of such evidence at trial would negatively affect the State's case because it would tend to negate the only link of Mr. O'Rear to the alleged crime scene and it would

conflict with the testimony of Deputy O'Donohue and the arguments made therefrom by the prosecutor. Under this scenario, given the probable negative impact on the State's case if the cigarette butt was actually preserved and produced at trial, one can infer that the State destroyed the cigarette butt to prevent such a negative impact and to prevent the likely acquittal of Mr. O'Rear. Given that the State actually knew or should have known the cigarette butt was essential to link Mr. O'Rear to the scene of the alleged crime, the State may have destroyed the socks at the same time as the alleged cigarette butt in an attempt to present a false impression that it was not destroying just one particular item of evidence; but instead, was considering them to be equally "insignificant".

55. Representing the alleged "hand-rolled" cigarette butt as "lost" enabled the State to admit testimony about the unique "hand-rolled" cigarette butt into evidence. This can be seen

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from the Court's statement made during oral argument at the post-conviction relief hearing in which it justified having admitted the trial testimony that was objected to as follows:

> [W]here evidence is scientifically analyzed and then lost unintentionally, or in the absence of bad faith, the result of the analysis is still admissible at trial. (Emphasis supplied) (R76, p.111)

56. As can be seen from paragraph 25 above, had the State represented the alleged "hand-rolled" cigarette butt as "destroyed" rather than "lost," the State would have been prevented from admitting testimony about it into evidence.

57. The Court did not know that the alleged cigarette butt was "destroyed" by the State many

months before trial rather than being accidentally "lost" as the State continually represented during trial and at the post-conviction relief hearing. This constitutes an error of fact outside the Court record.

58. Had this error of fact not occurred, there would have been no evidence to link Mr. O'Rear to the alleged scene of the crime.

59. The jury would have acquitted Mr. O'Rear had the cigarette butt testimony been stricken or had it known the truth about what happened to the alleged cigarette butt because:

a) it would have attached less credibility to the testimony of Deputy Sheriff O'Donohue, other police officers and other State witnesses; and

b) it would have attached less credibility to the testimony of Ms. Tuman. Her credibility had been strengthened, and that of Mr. O'Rear destroyed, by the

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cigarette butt testimony especially since that testimony came from a Deputy Sheriff and it was the only firm evidence presented to the jury that supported Ms. Tuman's version of events and that linked Mr. O'Rear to the scene of the alleged crime. (This was a 'classic credibility' case, particularly given that the jury otherwise doubted Ms. Tuman's credibility since it questioned the "Rush" issue during its deliberations). (R61, para. 10)

60. The Court would never have allowed the objected to testimony of Deputy O'Donohue to stand before the jury had it been presented with the truth about the destruction of the cigarette butt.

61. The Court would have overturned Mr. O'Rear's conviction and acquitted him had it known the truth about what happened to the cigarette butt because:

a) the Court convicted Mr. O'Rear and denied him post-conviction relief because the State led the Court to believe that it inadvertently "lost" the cigarette butt, when in reality it destroyed the cigarette butt prior to trial; and

b) no other evidence conclusively proved there was a sexual assault or that Mr. O'Rear was the perpetrator if there was such an assault.

62. Had appellate counsel known the State had actually destroyed the alleged "handrolled" cigarette butt rather than rely on the State's representations that it accidentally lost this evidence, counsel would have employed different legal

strategies at the post-conviction motion and appellate stages of this case. Said counsel would have, at minimum, applied the legal standard applicable to destroyed evidence instead of that applicable to lost evidence. (See Affidavit of Richard L. Cates, Exhibit 33 and Affidavit of James W. Gardner, Exhibit 34 attached.)

63. Mr. O'Rear had steadfastly maintained his innocence throughout his trial, his imprisonment and after his discharge from prison.

64. Mr. O'Rear has exhausted all potential state and federal remedies except for this petition for a writ of error coram nobis.

65. A writ of error coram nobis is a common law remedy that the Circuit Court can grant when there is no other remedy available to the defendant and when:

a) an error of fact occurred at trial,

b) the error is outside the court record, and

c) the Court should not and would not have entered judgment against the defendant had it known the fact which is not part of the court record.

66. The foregoing entitles Mr. O'Rear to a writ of error coram nobis to revoke and annul the conviction judgment that was

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rendered on January 8, 1981; or, in the alternative, to grant Mr. O'Rear a new trial.

Dated this 23rd day of October, 1989.

LAWTON & CATES, S.C.

By: *[signed: H. Arleen Wolek]*
John H. Bowers
H. Arleen Wolek
214 W. Mifflin Street
Madison, Wisconsin 53703
Attorneys for the Petitioner.

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[INDEX TO] APPENDIX
[to Petition for Writ of Error Coram Nobis]

RE: Terry J. O'Rear vs. State of Wisconsin

EXHIBIT NO.

1 R13 - Notice of Motion and Motion for Discovery

2 R14 - Demand for Discovery & Inspection

3 R61 - Affidavit of Attorney Strother
Exhibit C
Exhibit E
Exhibit G - first and last page.

4 R67 - Affidavit of District Attorney Antoine

5 R71 - Excerpts of Transcript of Jury Trial 1/6/81 (pages 8-11, 13, 15, 19, 20-25, 34, 43-44, 46-49, 51, 54, 60-63, 71, 83-84, 101, 102, 115, 116, 127, 128)

6 R72 - Excerpts of Transcript of Jury Trial 1/7/81 (pages 11, 15, 30, 31, 42, 46-49, 53, 63, 65, 66, 69, 76-82)

7 R73 - Excerpts of Transcript of Jury Trial 1/7/81 (p. 29, 121)

8 R74 - Excerpts of Transcript of Jury Trial 1/8/81 (p. 29, 31-32)

9 R75 - Excerpts of Transcript of Sentencing, 4/27/81 (p. 148, 149)

10 R76 - Excerpts of Transcript of Motion Hearing, 11/16/81 (p. 90, 91, 95, 102, 104-105, 111, 113, 115-116, 127-128)

11 Decision of Wisconsin Court of Appeals, December 13, 1982

12 Petition for Review to Wisconsin Supreme Court, January 11, 1983

13 Order Denying Petition for Review, March 9, 1983 (WI Supreme Court)

14 Division of Corrections letter dated June 20, 1983, re parole of T. O'Rear on May 26, 1983

15 Petition for Writ of Habeas Corpus, December 31, 1986

16 Order, dated January 12, 1987

17 Order and Judgment dismissing Petition for Writ of Habeas [Corpus]

18 Notice of Appeal to a Court of Appeals from a Judgment and/or Order of A District Court, dated March 26, 1987

19 Motion for Certificate of Probable Cause for Use in This 28 U.S.C. Section 2254 Case, dated March 26, 1987

20 Order denying request for Certificate of Probable Cause, dated March 27, 1987

21 Application for Certificate of Probable Cause, dated April 8, 1987 to U.S. Court of Appeals, Seventh Circuit

22 Order denying Application for Certificate of Probable Cause, dated May 14, 1987

23 Petition for Rehearing of Application for a Certificate of Probable Cause, With Suggestion for Rehearing IN BANC, dated May 27, 1987

24 Order denying Petition for Rehearing of Application, dated August 12, 1987

25 Application for the Issuance of a Certificate of Probable Cause, to Circuit Justice Stevens of the U.S. Supreme Court, and U.S. Mail receipt dated November 6, 1987.

26 Order to State of Wisconsin to file response, dated November 18, 1987

27 Denial by Judge Stevens of Application for Certificate of Probable Cause, dated December 4, 1987

28 Acknowledgment from Supreme Court re docketing of Petition for Writ of Certiorari, dated January 14, 1988, and Mr. O'Rear's letter of submission, dated January 7, 1988.

29 January 13, 1988 letter from Mr. O'Rear to Clerk of U.S. Supreme Court, requesting resubmission of Application for Certificate of Probable Cause

30 Denial of Application for Certificate of Probable Cause, dated February 22, 1988, and published citations of same: 108 S.Ct. 1058, 56 L.W. 3548

31 Affidavit of Edward Grosse dated October 17, 1989

32 Dane County Sheriff - Property Record tags, numbered 35515, 25871, 34420, 33574

33 Affidavit of Richard L. Cates dated October 16, 1989

34 Affidavit of James W. Gardner dated October 16, 1989

APPENDIX BB

[This document is presented as per S.C. Rule 14.1(h) **SOLEY so as TO ESTABLISH how the FEDERAL QUESTION was RAISED in the State Courts BELOW** THEREFORE, Here is set forth excerpts from the **October 23, 1989 with the original trial court** - Dane County (State of Wisc.) Circuit Court, Branch 6 (Judge J.C. Boll): **Brief in Support of Petition FOR WRIT OF ERROR CORAM NOBIS - Case: 89-CV-5909**]

[page -1-]

I. PROCEDURAL POSTURE OF THE EVENTS GIVING RISE TO THIS PETITION:

* * *

[page -3-]

II. PETITIONER'S STATEMENT OF FACTS:

* * *

[page -8-]

III. ARGUMENT.

A. A Writ Of Error Coram Nobis Is The Proper Remedy Because The Petitioner Fully Served The Sentence Imposed Upon Him And He Is No Longer In Custody.

* * *

[page -10- **emphasis added**]

* * *

B. The **Petitioner Was Denied Due Process Because The State Destroyed Potentially Exculpatory Evidence It Intended To Use In Bad Faith;** The State Knew The Significance Of The Evidence Before Destroying It, And Knew Or Should Have Known The Defendant Lacked Means To Obtain Comparable Evidence.

Failure of the prosecution to preserve evidence that is potentially useful to the criminal

defendant does not necessarily deprive him of due process of the law. **Arizona v. Youngblood**, **[488] U.S. [51]**, 109 S. Ct. 333 (1988). However, that defendant is deprived of due process when the State destroys potentially exculpatory evidence in bad faith, provided the significance of the evidence was apparent before destroying it and no alternative means were available to the defendant to obtain comparable evidence. Id., 109 S.Ct. at pp. 336-7, **California v. Trombetta, 467 U.S. 479 (1984)**, State v. Bauer, 123 Wis. 2d 444, 368 N.W.2d 59 (Ct. App. 1985).

Given the recency of the Youngblood ruling, it is worthwhile to first review the facts of the case underlying that ruling, and then to differentiate it from the case at bar. * * *

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[page -15-]

* * *

By contrast to Youngblood, rather than acknowledge that the alleged hand-rolled cigarette butt was destroyed, t**he prosecution**

[page -16- **emphasis added**]

in the case at bar misrepresented it as lost. In its case in chief, the prosecution used the alleged cigarette butt against Mr. O'Rear. The State knew or should have known that Mr. O'Rear's ability to thoroughly cross-examine the testimony about the alleged hand-rolled cigarette butt, if it were destroyed, would not be comparable to his ability to cross-examine that testimony if the butt were physically present in the courtroom. **The jury was never instructed that it could infer lost or destroyed evidence against the State's interest.** Then, at the postconviction hearing, **the prosecution continued to misrepresent** the alleged evidence as lost. This set of fact constitutes bad faith conduct on the part of the State.

C. The Petitioner Was **Denied Due Process Because The State** Knew Or Should Have Known It Destroyed the Alleged Cigarette Butt Before It Represented That Evidence As Lost And Because It **Failed to Disclose the Truth** About The Actual Disposition Of Such Evidence.

* * *

[page -17- **emphasis added**]

* * *

Assistant District Attorney Antoine has admitted he became aware that the butt was "missing" prior to O'Donohue's testimony concerning it "loss". (R76, pp. 127-8). However, the prosecutor withheld this knowledge from the defense and the court, thereby preventing the defense from successfully objecting to O'Donohue's testimony concerning the cigarette butt prior to its presentation before the jury. **It has been held improper for a district attorney to "decide for the court what is admissible or for the**

[page -18 - **emphasis added**]

defense what is useful." Griffin v. U.S., 183 F.2d 990, 993 (D.C. Ct. App. 1950). Yet, in effect, that is what the district attorney did by not accurately representing the actual disposition of the alleged cigarette butt.

The prosecution cannot allow false evidence or testimony to go uncorrected and it has a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath. Giles v. Maryland, 386 U.S. 66 (1967), California v. Trombetta, 467 U.S. 484 (1984), Britton v. State, 44 Wis.2d 109, 170 N.W.2d 785 (1969). It has long been held that **"evidence may be false either because it is perjured, or though not itself factually inaccurate, because it creates a false impression of facts which are known not to be true", Hamric v. Bailey, 386 F.2d 390, 394 (4th Cir.**

1967). See also: U.S. v. Iverson, 637 F.2d 799, 805 (D.C. Cir. 1980); U.S. v. Barham, 595 F.2d 231 (5th Cir. 1979). It is also well accepted that "[f]ailure of defense counsel to flesh out such misinformation, if known to be such by the prosecution, would not excuse the prosecutor's nondisclosure [of the false or mistaken testimony]." U. S. v. Poole, 379 F.2d 645 (7th Cir. 1967); Evans v. Janing, 489 F.2d 470, 476, n. 18 (8th Cir. 1973).

* * *

[page -20- emphasis added]

D. The **State's Destruction Of The Alleged Cigarette Butt, And Its Misrepresentation Of That Evidence As Lost, Deprived The Petitioner Of Due Process** Because The State Had A Duty To Preserve It And The Court Would Not Have Admitted That Evidence Had It Known The Truth About Its Disposition.

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When making the decision as to whether admission of evidence violated the defendant's right to due process, the court applies different standards depending upon whether the admitted evidence was lost or destroyed. State v. Bauer, 123 Wis. 2d at pp. 449-450, State v. Amundson, 69 Wis. 2d 554, 230 N.W.2d 775 (1975). When evidence was merely lost, the defendant must satisfy a more stringent standard. To show that the evidence should have been excluded, the defendant must set forth plausible reasons for why the lost evidence was both material to guilt or innocence and favorable to him. State v. Bauer, 123 Wis. 2d at p. 449.

By contrast, the standard for destroyed evidence is less demanding on the defendant than that for lost evidence because it is essential to deter the State from destroying potentially exculpatory evidence and from subverting the purpose of the disclosure rules. State v. Amundson, 69 Wis. 2d at p

. 577. Therefore, the defendant need only show that destroyed evidence was material because he cannot possibly prove it would have been favorable to him. If it was material to his guilt or innocence, the evidence should have been excluded because it is presumptively exculpatory. Admission of such evidence deprives a defendant of his right to due process of the law. Id., 69 Wis., 2d at p. 578, State v. Bauer, 123 Wis. 2d at p. 450.

[page -23- **emphasis added**]

Evidence is material and relevant if it is offered to prove, or to be probative of, a disputed issue. State v. Disch, 119 Wis. 2d 461, 351 N.W.2d 492 (1984). **McCormick's Law of Evidence**, 2d Ed., sec. 185 at p. 434 (1972), 3d Ed., sec. 542 (1984). The cigarette butt testimony was offered to establish a probative link between Mr. O'Rear and the crime scene, to discount his claim that he was never in the parking lot in question, and to thereby discredit his overall credibility.

The alleged cigarette butt was material and relevant to Mr. O'Rear's guilt or innocence because it potentially linked him to the scene of the alleged crime. Because no other evidence substantiated Ms. Tuman's accusation that a sexual assault occurred or that Mr. O'Rear was the assailant if one did occur, testimony about alleged evidence linking Mr. O'Rear to the scene of the alleged crime was material to whether or not the jury would believe Ms. Tuman's accusation over Mr. O'Rear's plea of innocence. The cigarette butt evidence was the only evidence in the record that directly refutes Mr. O'Rear's testimony that he was never in the parking lot of the Speedway Bar. The cigarette butt testimony, as it was presented by Deputy O'Donohue, was an irrefutable attack upon Mr. O'Rear's key defense given that he was deprived of the opportunity to impeach her testimony and to corroborate his version of the facts. **Because the alleged cigarette butt was material, the Court must now presume it was favorable** to Mr.

O'Rear. Interstate Circuit v. United States, 306 U.S. 208, (1939); People v. Karns, 130 Misc.2d 247, 495

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N.Y.S.2d 890 (1985); Trimble v. State, 75 N.M. 183, 402 P.2d 162 (1965) and State v. Wright, 87 Wash. 2d 783, 557 P.2d 1 (Wash. 1976; en banc), Deberry v. State, 457 A.2d 744, 754 (Del. 1983).

While the prosecutor did not offer any explanation for the "loss" of the cigarette butt at the postconviction hearing and he continued to mislead the Court that it was only lost and not destroyed, what he argued concerning the "evidence" highlights both the fundamental unfairness of the entire process for the defendant and the prosecutor's continued misrepresentations. Whereas the prosecutor went to considerable length to get O'Donohue's testimony regarding the cigarette butt before the jury so as to bolster his case at trial, he characterized the evidentiary value of the cigarette butt as only "minuscule" at the postconviction hearing. At the latter proceeding, Assistant District Attorney Antoine alluded to the fact that the cigarette butt may well have belonged to another bar patron as "there are people, many people, in that economic bracket [frequenting that bar] who roll their own cigarettes" and he further questioned "whether that particular item was found...almost twenty-four hours after the occurrence." (R76, pp. 104-05).

If the prosecutor has such misgivings as to the authenticity and validity of such evidence, why did he present it to the jury other than to link Mr. O'Rear to the alleged crime scene? Indeed, even the trial Judge stated at the postconviction hearing that "the reason that the prosecution introduced that evidence was because they thought that it would bolster their case." (R76,

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p. 113). Moreover, at trial, the prosecutor did not

limit his use of this evidence, which he later claimed to be "minuscule" in value, to his questioning of Deputy O'Donohue. Rather, he continually used it to link Mr. O'Rear to the crime scene. * * *

* * *

[page -30- **emphasis added**]

* * *

E. Because **The Destruction Of Material Evidence Deprived The Petitioner Of His Right To Due Process of The Law,** Justice Requires That His Conviction Be Reversed; Or That, In The Alternative, He Be Granted A New Trial.

* * *

[page -34- **emphasis added**]

* * *

IV. CONCLUSION:

The State's destruction of the alleged cigarette butt, and its continuous misrepresentation of that evidence as lost rather than destroyed, significantly affected the outcome of this case. **The State had the duty to preserve the alleged evidence. It failed to act in a forthright manner both in its destruction of the evidence and in how it conducted itself thereafter. Because of this governmental misconduct,** there was an adverse effect on defense strategies, on the court's judgment regarding admissibility, on the jury verdict, and on Mr. O'Rear's ability to successfully obtain postconviction relief in his postverdict motions and extensive appeals. Consequently, there has been such significant prejudice to Mr. O'Rear that the Court should grant

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[page -35-]

him a writ of error coram nobis and reverse his conviction. At minimum, the writ and a new trial, free from tainted evidence, should be granted.

Dated this 23rd day of October, 1989.

LAWTON & CATES, S.C.

BY: [*Signed H. Arleen Wolek*]
H. Arleen Wolek * * *

APPENDIX CC

[Here is set forth excerpts from **This Court**'s Opinion& Decision of **November 29, 1988** in the case of **Arizona v. Youngblood**, 488 U.S. 51 (1988) - reprinted here given the importance to the case at hand and since this case was used extensively by Petitioner in presentations establishing the federal question to the courts Below] [footnotes omitted]

[page - 488 U.S. 52-]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

* * *

We granted certiorari to consider the extent to which the Due Process Clause of the Fourteenth Amendment requires the State to preserve evidentiary material that might be useful to a criminal defendant.

* * *

[page - 488 U.S. 55-]

* * *

Decision of this case requires us to again consider "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). In *Brady v. Maryland*, 373 U.S. 83 (1963), we held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*, at 87. In *United States v. Agurs*, 427 U.S. 97 (1976), we held that the prosecution had a duty to disclose some evidence of this description even though no requests were made for it, but at the same time we rejected the notion that a "prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel." *Id.*, at

111; see also *Moore v. Illinois*, 408 U.S. 786, 795 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case").

There is no question but that the State complied with *Brady* and *Agurs* here. The State disclosed relevant police reports to respondent, which contained information about the existence of the swab and the clothing, and the boy's examination at the hospital. The State provided respondent's expert with the laboratory reports and notes prepared by the police criminologist, and respondent's expert had access to the swab and to the clothing.

[page- 488 U.S. 56-]

If respondent is to prevail on federal constitutional grounds, then, it must be because of some constitutional duty over and above that imposed by cases such as *Brady* and *Agurs*. Our most recent decision in this area of the law, *California v. Trombetta*, 467 U.S. 479 (1984), arose out of a drunken driving prosecution in which the State had introduced test results indicating the concentration of alcohol in the blood of two motorists. The defendants sought to suppress the test results on the ground that the State had failed to preserve the breath samples used in the test. We rejected this argument for several reasons: first, "the officers here were acting in 'good faith and in accord with their normal practice,'" *id.*, at 488, quoting *Killian v. United States*, 368 U.S. 231, 242 (1961); second, in the light of the procedures actually used the chances that preserved samples would have exculpated the defendants were slim, 467 U.S., at 489; and, third, even if the samples might have shown inaccuracy in the tests, the defendants had "alternative means of demonstrating their innocence." *Id.*, at 490. In the present case, the likelihood that the preserved materials would have enabled the defendant to

exonerate himself appears to be greater than it was in *Trombetta*, but here, unlike in *Trombetta*, the State did not attempt to make any use of the materials in its own case in chief.*[footnote omitted]

[page - 488 U.S. 57-]

Our decisions in related areas have stressed the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government. In *United States v. Marion*, 404 U.S. 307 (1971), we said that "[n]o actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." *Id.*, at 325; see also *United States v. Lovasco*, 431 U.S. 783, 790 (1977). Similarly, in *United States v. Valenzuela-Bernal, supra*, we considered whether the Government's deportation of two witnesses who were illegal aliens violated due process. We held that the prompt deportation of the witnesses was justified "upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution." *Id.*, at 872.

The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in *Trombetta, supra*, at 486, that "[w]henever potentially excul-

patory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause, see *Lisenba v. California*, 314 U.S. 219, 236 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

In this case, the police collected the rectal swab and clothing on the night of the crime; respondent was not taken into custody until six weeks later. The failure of the police to refrigerate the clothing and to perform tests on the semen samples can at worst be described as negligent. None of this information was concealed from respondent at trial, and the evidence - such as it was- was made available to respondent's expert who declined to perform any tests on the samples. The Arizona Court of Appeals noted in its opinion - and we agree - that there was no suggestion of bad faith on the part of the police. It follows, therefore, from what we have said, that there was no violation of the Due Process Clause.

The Arizona Court of Appeals also referred somewhat obliquely to the State's "inability to

quantitatively test" certain semen samples with the newer P-30 test. 153 Ariz., at 54, 734 P.2d, at 596. If the court meant by this statement

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that the Due Process Clause is violated when the police fail to use a particular investigatory tool, we strongly disagree. The situation here is no different than a prosecution for drunken driving that rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests.

The judgment of the Arizona Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

JUSTICE STEVENS, concurring in the judgment.

* * *

[page - 488 U.S. 60-]

* * *

Presumably, in a case involving a closer question as to guilt or innocence, the jurors would have been more ready to infer that the lost evidence was exculpatory.

* * *

[page - 488 U.S. 61-]

* * * In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair. This, however, is not such a case. Accordingly, I concur in the judgment.

* * *

APPENDIX DD

[Here is set forth excerpts from **This Court**'s Decision of **June 11, 1984** in the case of **California v. Trombetta**, 467 U.S. 479 - reprinted here given the importance to the case at hand and since this case was used extensively by Petitioner in presentations establishing the federal question to the courts Below] [unless otherwise noted footnotes omitted]

[page - 467 U.S. 485-]

II

Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.

The most rudimentary of the access-to-evidence cases impose upon the prosecution a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath. *Napue v. Illinois*, 360 U.S. 264, 269-272 (1959); see also *Mooney v. Holohan*, 294 U.S. 103 (1935). But criminal defendants are entitled to much more than protection against perjury. A defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be

imposed. *Brady v. Maryland*, 373 U.S., at 87. Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt. *United States v. Agurs*, 427 U.S., at 112. The prosecution must also reveal the contents of plea agreements with key government witnesses, see *Giglio v. United States*, 405 U.S. 150 (1972), and under some circumstances may be required to disclose the identity of undercover informants who possess evidence critical to the defense, *Roviaro v. United States*, 353 U.S. 53 (1957).

[page - 467 U.S. 486]

Less clear from our access-to-evidence cases is the extent to which the Due Process Clause imposes on the government the additional responsibility of guaranteeing criminal defendants access to exculpatory evidence beyond the government's possession. On a few occasions, we have suggested that the Federal Government might transgress constitutional limitations if it exercised its sovereign powers so as to hamper a criminal defendant's preparation for trial. For instance, in *United States v. Marion*, 404 U.S. 307, 324 (1971), and in *United States v. Lovasco*, 431 U.S. 783, 795, n. 17 (1977), we intimated that a due process violation might occur if the Government delayed an indictment for so long that the defendant's ability to mount an effective defense was impaired. Similarly, in *United States v. Valenzuela-Bernal*, *supra*, we acknowledged that the Government could offend the Due Process Clause of the Fifth Amendment if, by deporting potential witnesses, it diminished a defendant's opportunity to put on an effective defense.[6]

[Footnote [6] In related cases arising under the Sixth and Fourteenth Amendments, we have recognized that criminal defendants are entitled to call witnesses on their own behalf and to cross-examine witnesses who have testified on the government's behalf. See *Davis v. Alaska*, 415 U.S. 308 (1974); *Washington v. Texas*, 388 U.S. 14 (1967).]

458 U.S., at 873.

We have, however, never squarely addressed the government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants. The absence of doctrinal development in this area reflects, in part, the difficulty of developing rules to deal with evidence destroyed through prosecutorial neglect or oversight. Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed. Cf. *United States v. Valenzuela-Bernal, supra*, at 870. Moreover, fashioning remedies for the illegal destruction of evidence can pose troubling choices. In nondisclosure cases, a court can

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[page -467 U.S. 487]

grant the defendant a new trial at which the previously suppressed evidence may be introduced. But when evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing - as the California Court of Appeal did in this case - the State's most probative evidence.

One case in which we have discussed due process constraints on the Government's failure to preserve potentially exculpatory evidence is *Killian v. United States*, 368 U.S. 213 (1961). In *Killian*, the petitioner had been convicted of giving false testimony in violation of 18 U.S.C. § 1001. A key element of the Government's case was an investigatory report prepared by the Federal Bureau of Investigation. The Solicitor General conceded that, prior to petitioner's trial, the F.B.I. agents who prepared the investigatory report destroyed the preliminary notes they had made while interviewing witnesses. The petitioner argued that these notes would have been helpful to his defense and that the agents had violated the Due Process Clause by

destroying this exculpatory evidence. While not denying that the notes might have contributed to the petitioner's defense, the Court ruled that their destruction did not rise to the level of constitutional violation:

> "If the agents' notes . . . were made only for the purpose of transferring the data thereon . . . , and if, having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practices, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right." *Id.*, at 242.

In may respects the instant case is reminiscent of *Killian v. United States*. To the extent that respondents' breath samples came into the possession of California authorities, it was for the limited purpose of providing raw data to the

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[page - 467 U.S. 488-]

Intoxilyzer.[footnote 7 omitted] The evidence to be presented at trial was not the breath itself but rather the Intoxilyzer results obtained from the breath samples. As the petitioner in *Killian* wanted the agents' notes in order to impeach their final reports, respondents here seek the breath samples in order to challenge incriminating tests results produced with the Intoxilyzer.

Given our precedents in this area, we cannot agree with the California Court of Appeal that the State's failure to retain breath samples for respondents constitutes a violation of the Federal Constitution. To begin with, California authorities in this case did not destroy respondents' breath samples in a calculated effort to circumvent the disclosure requirements established by *Brady v. Maryland* and its progeny. In failing to preserve breath samples for respondents, the officers here were acting "in good faith and in accord with their

normal practice." *Killian v. United States*, *supra*, at 242. The record contains no allegation of official animus towards respondents or of a conscious effort to suppress exculpatory evidence.

More importantly, California's policy of not preserving breath samples is without constitutional defect. Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. [footnote 8 omitted]

[page - 467 U.S. 489]

To meet this standard of constitutional materiality, see *United States v. Agurs*, 427 U.S., at 109-110, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Neither of these conditions is met on the facts of this case.

* * *

APPENDIX EE

[This document is presented as per S.C. Rule 14.1(h) **SOLEY so as TO ESTABLISH how the FEDERAL QUESTION was RAISED in the State Courts BELOW** THEREFORE, Here is set forth excerpts from the document filed **Nov. 19, 1990 with the replacement judge** - Dane County (State of Wisc.) Circuit Court, Branch 2 (Judge M.B. Torphy) in re **Case No. 89-CV-5909: Brief in Opposition to Motion to Quash**

[page-7- **-emphasis added**]

* * *

. . . By contrast, when the State destroys evidence, the defendant need only show that the destroyed evidence was material to his guilt or innocence because he cannot possibly prove it would have been favorable to him. In that scenario, such material evidence is not admissible because it is presumptively exculpatory. The State then has the burden to overcome the presumption that evidence it destroys is exculpatory. State v. Bauer, 123 Wis. 2d at p. 450, State v. Amundson, 69 Wis.2d at p. 578. (**For a more detailed review of the law pertinent to the different legal standards, please refer to Petitioner's Brief in Support of**

[page -8- emphasis added **Petition for Writ of Error Coram Nobis at pp. 22-24**). [See App. BB attached to today's Petition for certiorari at pp. 126-8a, *supra*]

That the State destroyed its "evidence" is an error of fact which is not on the record, the prosecution kept the fact of destruction outside the record and the Court did not know the truth until now. Mr. O'Rear should not be penalized because he did not discover the State's prejudicial error sooner. More importantly, the State should not benefit from having obtained a conviction against Mr. O'Rear based on its misrepresentation of what happened to its evidence, regardless of whether it destroyed the

cigarette butt intentionally, negligently, accidentally or coincidentally. This is particularly true given that the reason for the more stringent legal standard applicable to destroyed evidence is to deter the State from destroying potentially exculpatory evidence and from subverting the purpose underlying the disclosure rules. **State v. Amundson,** 69 Wis. 2d at p. 577. **[Reprinted as App W, attached to today's Petition for certiorari at pp. 90-3 *supra*]** The truth is, the State destroyed the evidence, it misrepresented that fact, neither Mr. O'Rear nor the Court ever knew that fact and the State's misrepresentation caused Mr. O'Rear's conviction to stand.

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* * *

The State cannot prevail here, however, because the same issue has never been before the Court, nor could it have been, since the fact of destruction was not previously known by the petitioner or by the Court. Only the State knew that it destroyed the cigarette butt; and even if it did not previously know this fact, it should have. United States v. Agurs, 427 U.S. 110 (1976). The State should not now profit from the petitioner's and the Court's prior ignorance. * * *

* * *

APPENDIX FF

[This document is presented **IN PART** as per S.C. Rule 14.1(h) **So as TO ESTABLISH how the FEDERAL QUESTION was RAISED in the State Courts BELOW** THEREFORE, Here is set forth excerpts from the **Official Transcript of Oral Argument Hearing held in re Coram Nobis Petition** before **Judge Michael Torphy**, Dane County Circuit Court, Branch 2, in **O'Rear v. State of Wisconsin, # 89-CV-5909 - Dec. 12, 1990 -**

[page -2- **emphasis added**]

(WHEREUPON, the following proceedings were had in open Court:)

THE COURT: We are on the record in the matter entitled Terry O'Rear, petitioner, vs. State of Wisconsin, respondent, Case 89-CF-5909. The matter at hand is a motion to quash writ of error coram nobis, and the State appears by Assistant -- by District Attorney, excuse me, sir, Mr. Foust, whose motion it is, obviously, and Mr. O'Rear appears in person and with counsel, Mr. John Bowers and Ms. Arleen Wolek.

There have been briefs filed. I would hope that you wouldn't read those back to me this afternoon. Mr. Foust, it's your motion?

MR. FOUST: Judge, because the issues have been rather thoroughly briefed, I will try myself to be very brief. **The written motion that I filed for the respondent states as grounds three propositions:** First, that coram nobis does not reach the question of a misrepresentation of facts; second, that the error complained of does not go outside the record; and third, that the error complained of would not have prevented the entry of judgment.

In my brief I argued a fourth proposition, and that was that the petitioner had already had a

[statement continues on next Appendix page]

[O'Rear v. State of Wisconsin, # 89-CV-5909
Transcript - **Dec. 12, 1990 - Oral Hearing re Coram Nobis Petition** - held before **Judge Michael Torphy,** Dane County Circuit Court, Branch 2]

[page 3 - **emphasis added to text on p. 3 &4**]
[Cont'd argument before the Court (Judge Torphy) by RESPONDENT- District Attorney MR. FOUST]:

shot at the relief requested or the remedy sought on this issue in the Court of Appeals.

The first proposition that I raise, the coram nobis does not reach the misrepresentation of fact, I raised only insofar as the petition for relief alleges an intentional misrepresentation in the course of trial by the witnesses. **I think that is not really the crux of the petition, and I'm not going to speak any further today on that** particular proposition.

The **second proposition** that I stated, the coram nobis or that the earlier complained of error was not an error occurring outside the record, **I will drop for the purposes of this motion.** It may become an issue if we get to a hearing on the merits. It may be an issue as to just what the error was -- are we really talking destruction, are we talking something being misplaced or lost -- but I think **today you have to assume that there was a destruction of the item of evidence, and I think that the error complained of is the destruction of that evidence, and that clearly is outside the record of the trial** and sanctions, so I'm not arguing that proposition today.

The third proposition, and the one that I think is dispositive of the case, is that the error

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complained of would not have prevented entry of judgment, and that proposition really **goes hand in hand with the fourth proposition** that I raised in my brief; that is, **that the petitioner had an opportunity at relief on this issue** previously in the Court of Appeals and shouldn't be heard to raise it again in this proceeding today. * * *

[O'Rear v. State of Wisconsin, # 89-CV-5909
Transcript - **Dec. 12, 1990**
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held before **Judge Michael Torphy,**
Dane County Circuit Court, Branch 2]

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[THE COURT {Judge Torphy} continued from p. 15]:

somebody found the cigarette butt?

MS. WOLEK [Defense-Petitioning Attorney]: Someone found the cigarette butt and it was implied it was missing or lost.

THE COURT: No attempt to produce evidence of testing?

MS. WOLEK: Pardon?

THE COURT: No attempt to produce evidence that it was tested?

MS. WOLEK: Correct.

THE COURT: Thank you.

MS. WOLEK: Uh-huh. Now, in subsequent briefings the State has indicated that this cigarette butt is fairly insignificant. However, if it was, why did they direct someone to find it, why did they direct someone to put it in the evidence room, and why did they have the officer testify about it? So if it was so insignificant they didn't even have her present it at trial and they have three other people testify about it.

And why did they not, perhaps, mention that it was destroyed, if they knew that, and I don't know if they knew that at that point, because there's a different standard applied to lost evidence as opposed to destroyed evidence. And if it's lost, it's much easier to get that evidence admitted, and

[statement continues on next Appendix page]

[Cont'd argument before the Court {Judge Torphy} by DEFENSE- Petitioning COUNSEL, MS. WOLEK]

it's much easier to obtain a conviction, and if it's destroyed it's presumed exculpatory and the defendant doesn't have to show that it's favorable to them. State v. Amundson and State v. Bauer give us that doctrine.

Now, we need to look further at what happened. After trial, some ten months later, there's a postconviction motion hearing, and at that hearing or prior to that hearing Assistant District Attorney Antoine submits an affidavit in which he says that the cigarette butt is lost, so he's affirmatively now representing for the first time that this evidence is lost. He says in this affidavit that he didn't find out about the loss until Ms. Tuman or Ms. O'Donohue took the stand and said that it was missing.

The Court then applies the standard to lost evidence rather than to destroyed evidence, and it acknowledges that it's doing that because the Court says, quote, considering, also, the fact that the prosecution indicates that it lost the cigarette in good faith, but didn't destroy it, that the Court should not grant a new trial on this ground.

Now, Assistant District Attorney Antoine wins his motion. He then goes to the Court and he

[statement continues on next Appendix page]

[O'Rear v. State of Wisconsin, # 89-CV-5909
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[Cont'd argument before the Court {Judge Torphy} by DEFENSE- Petitioning COUNSEL, MS. WOLEK]

says he wants to correct his affidavit for purposes of appellate court record, and he says he's doing that because Attorney Cates' argument was particularly persuasive, so he says that to correct his affidavit he doesn't totally recall, but he thinks that he probably knew about the lost evidence, which was actually destroyed. He claims he knew about it probably just before Officer O'Donohue took the stand.

Now, just last week I received correspondence from District Attorney Foust. I'd like to offer it into evidence.

(Exhibit #1 marked)

Now, Antoine didn't recall ten months after trial as to what happened, but suddenly last week I find this out, quote, as best I can determine, Antoine first learned that the cigarette butt was not to be found shortly before Deputy O'Donohue testified. She apparently arrived in his office and he inquired as to the physical evidence. She said that she had not gotten it. Antoine recalls sending someone down to get the cigarette butt. Antoine's recollection is that he was told that it could not be found. Antoine had no occasion earlier to determine the status of the cigarette butt because Attorney Strother indicated

[statement continues on next Appendix page]

[Cont'd argument before the Court {Judge Torphy} by DEFENSE- Petitioning COUNSEL, MS. WOLEK]

he did not wish to see the physical evidence.

Now, why does he suddenly recall? It certainly seems awfully self-serving that he corrected his affidavit after he already won the motion, and it also appears very self-serving that he suddenly recalls what happened prior to trial.

Now, the law says that the State has to exercise due diligence in acquiring its evidence and in disclosing what happens to that evidence. The doctrine for that is Wold v. State, 57 Wis. 2d 344, 1973 case.

Now, Mr. Antoine had ample time to find out what happened to that evidence. If, indeed, he found out about it before O'Donohue took the stand, all he had to do was send someone to the evidence room, look for the tag, and find out that that had been destroyed, and then it was his duty to disclose to the Court that it was, indeed, destroyed, and that evidence would have never gotten in front of the jury, had he done that.

He also -- If he wasn't going to do that before trial, he had ten months after trial to find out what happened to that evidence and to represent it properly at the postconviction motion hearing, particularly if he's going to sign an affidavit that

[statement continues on next Appendix page]

[Cont'd argument before the Court {Judge Torphy} by DEFENSE- Petitioning COUNSEL, MS. WOLEK]

says that it's lost, because that's indicating that he has some reason to know what happened to that evidence, and it would have been very simple for him to find out that it was destroyed.

The State also has a constitutional duty to correct false testimony under Giles v. Maryland, 386 U.S. 66, 1964 case. And it's also been found that testimony is false if it creates a false impression of the facts, and that's under U.S. v. Iverson, 637 Fed. 2d 799, D.C. Circuit in 1980. And our own state under Milkulovsky, 54 Wis. 2d 699, 1972 case, says that the defendant is deprived of due process when the prosecution fails to correct false testimony.

Now, the --

THE COURT [Judge Torphy]: Let me ask you a question as to whether or not you feel that that testimony is such that it is in the mind of the fact finder when they're making the deliberation, in short, the testimony to the jury or some statement to the Court on the postconviction motion?

MS. WOLEK: We believe that the jury inferred that the cigarette butt was missing, which implies that it was lost, but it implies that it was found, and that was the only thing to corroborate

[statement continues on next Appendix page]

[O'Rear v. State of Wisconsin, # 89-CV-5909
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(**Oral Argument Hearing re Coram Nobis Petition**)
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Dane County Circuit Court, Branch 2]

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[Cont'd argument before the Court (Judge Torphy) by DEFENSE- Petitioning COUNSEL, MS. WOLEK]

Ms. Tuman's story. We also believe that a representation that something is lost at postconviction motion hearings and throughout the appellate court process, which lasted for a substantial period of time, that continuing to represent it as lost definitely creates a false impression of the fact that it was destroyed, because there's a totally different standard that applies to lost versus destroyed evidence.

So if the Court is hearing -- In the jury's mind, the jury doesn't necessarily know that there's a different standard applied, but the fact that it got to the jury, the jury's now able to infer that there, indeed, was a hand-rolled cigarette butt at the scene, and that's going to bolster in their mind that he was present at the scene.

THE COURT: Wouldn't the same inference occur, whether it was lost or destroyed? What's the difference?

MS. WOLEK: Pardon?

THE COURT: What's the difference? How would the jury vary its assumption, the assumption, as you call it, whether they find that -- they assume that it was lost or whether they assume --

MS. WOLEK: The jury's not going to hear

[statement continues on next Appendix page]

[Cont'd argument before the Court {Judge Torphy} by DEFENSE- Petitioning COUNSEL, MS. WOLEK]

about it if it was destroyed because then it's presumptively exculpatory and the Court would not allow it to be admitted.

THE COURT: Go ahead.

MS. WOLEK: So I think in looking at the poor evidence that is already in the record, the fact that Ms. Tuman has taken Rush, the fact that the jury was unable to give total credibility to Ms. Tuman about the fact it asked how many hits were in a bottle of Rush and how many hits it takes to produce a high, that shows that they were not totally believing Ms. Tuman's testimony. So absent that cigarette butt, there's nothing to bolster Ms. Tuman's testimony. So I think that the Court should be able to see that the cigarette butt has tremendous significance to the outcome of this case.

Now, the State has argued that we've had the opportunity to discuss this issue in front of the Court of Appeals. While this was going on at the appellate level, nothing was known about the destruction. We did not know about the destruction until a year and a half ago, after all appellate remedies that could be pursued had been pursued, so we have never had the opportunity at any point to litigate this issue. And the State has also said --

[statement continues on next Appendix page]

[O'Rear v. State of Wisconsin, # 89-CV-5909
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[Cont'd argument before the Court {Judge Torphy} by DEFENSE- Petitioning COUNSEL, MS. WOLEK]

Mr. Foust has said that in White v. Murtha, that unless the evidence is substantially different, that the conviction would sustain. This is substantially different facts. This is a destroyed piece of evidence, as opposed to a lost piece of evidence, and that is a substantially different characteristic.

The State's mission in prosecuting criminal cases is to make sure that justice is rendered. It's also their mission to hang onto and preserve evidence that they're going to use against someone, and it's their mission to make sure if they're going to obtain a conviction that they're going to do that fairly. This just does not smack of fairness. Mr. O'Rear did not obtain a fair trial. He was not fairly found guilty. The evidence does not corroborate that a rape ever occurred. It does not corroborate that Mr. O'Rear was the rapist, if one did occur, and it's just blatantly unfair for the State to be able to misrepresent the evidence it's going to use against someone and obtain a conviction.

Now, one last thing the State mentioned, that coram nobis does not reach a misrepresentation of fact, and it's acknowledged that it's going to -- it's not going to fight that issue tremendously. Actually, I think I'm not going to get into that issue.

* * *

[Cont'd argument before the Court {Judge Torphy} by PROSECUTOR--District Attorney, MR. FOUST]

argued that lost versus destruction is a change of facts. That is an irrelevant change of facts. What has occurred in this case is that the Court of Appeals has evaluated the evidence in this case without reference to the cigarette butt and has concluded that the evidence in this case without reference to the cigarette butt would not yield any probability of a different result upon retrial. Counsel can't sit here today then and ask you to conclude that there necessarily would be a different result on a retrial in this case without reference to the cigarette butt.

I disagree with counsel's understanding of Amundson. The Court of Appeals dealt with Amundson at Pages 6 and 7 of the Slip Opinion in this case and points out that you do have to differentiate between lost evidence and destroyed evidence, and that if the prosecution has destroyed evidence, the defendant has no way to show whether or not it would have been exculpatory, and that therefore there is a presumption that it's exculpatory. However, that is not to sidestep the prosecution. That initial presumption that the evidence was exculpatory simply puts the burden on the State to come in and explain what happened to it.

[statement continues on next Appendix page]

[O'Rear v. State of Wisconsin, # 89-CV-5909
Transcript - **Dec. 12, 1990**
{**Oral Argument Hearing re Coram Nobis Petition**}
held before **Judge Michael Torphy,**
Dane County Circuit Court, Branch 2]

- [page 26] -

[Cont'd argument before the Court {Judge Torphy} by PROSECUTOR--District Attorney, MR. FOUST]

Now, that explanation of what happened to it I don't think is appropriate today on a motion to quash that goes only to the pleadings, but I don't think that Amundson necessarily dictates the cigarette butt would have been out of the evidence in this case. In fact, it's out of the evidence in the case only if the Court ultimately concludes it is exculpatory, whether by virtue of the presumption or whether by virtue of the State's failure to give a satisfactory explanation for the loss or destruction.

Again, though the fact of the matter is that the Court of Appeals has addressed the status of the cigarette butt, lost, destroyed, or otherwise, the Court of Appeals says at Page 7 of its Slip Opinion here, "However, it is impossible for the missing evidence to be exculpatory." I mean, that doesn't broach any quibbling over loss or destruction. It couldn't possibly have been exculpatory.

The balance of counsel's argument are a commendable second attempt at closing argument to the trial of the case, but the remarks are not appropriate and don't go to the relief requested here on coram nobis. This is not a time to retry the whole case. This is a time for you to decide

* * *

APPENDIX GG

[This document is presented as per S.C. Rule 14.1(h) **SOLEY so as TO ESTABLISH how the FEDERAL QUESTION was RAISED in the State Courts BELOW** THEREFORE, Here is set forth excerpts from the Document filed **June 21, 1991** with the (State of Wisconsin) **Court of Appeals,** District IV, in re: **Case no. 91-0832 - O'REAR v. STATE - Brief of Plaintiff-Appellant in Support of *Coram* Appeal**]

* * *

[page -13-]

QUESTIONS PRESENTED

1. When the State destroys evidence which places the criminal defendant at the crime scene, is testimony about that destroyed evidence admissible?

Answered by the circuit court: Implied such testimony would be excluded.

2. When, prior to trial, the State destroys evidence that places the criminal defendant at the crime scene and that is the only objective evidence to corroborate the complainant's story, yet the State repeatedly misrepresents to the trial and appellate courts that it lost rather than destroyed the evidence, thereby assuring its admissibility, must the conviction obtained by the State be reversed or a new trial granted?

Answered by the trial court: No.

3. Would the appellant have been convicted beyond a reasonable doubt had the trial judge excluded all testimony concerning evidence the State destroyed more than 4-1/2 months before trial but misrepresented as lost at trial and throughout the appellate process?

Answered by the trial court: Yes.

[page -16-]

LEGAL ARGUMENT

I. CORAM NOBIS RELIEF IS THE PROPER REMEDY TO GRANT MR. O'REAR BECAUSE THE SITE DESTROYED KEY EVIDENCE WHICH IT REPRESENTED AS LOST, THE TRIAL COURT COULD NOT HAVE ADMITTED TESTIMONY ABOUT SUCH EVIDENCE HAD IT KNOWN THE TRUTH, ABSENT SUCH TESTIMONY THE STATE COULD NOT HAVE PROVEN GUILT BEYOND A REASONABLE DOUBT, AND APPELLANT HAS EXHAUSTED ALL OTHER REMEDIES.

* * *

[page -18 - **emphasis added**]

II. TESTIMONY ABOUT POTENTIALLY EXCULPATORY EVIDENCE DESTROYED BY THE STATE IS INADMISSIBLE BECAUSE IT WOULD DEPRIVE THE CRIMINAL DEFENDANT OF DUE PROCESS.

The circuit court erred by finding the trial court "could" have admitted or excluded testimony about the alleged hand-rolled cigarette butt (Rec. 23, pp.1-2) even if the State had been forthright in disclosing it destroyed such evidence and had not merely lost it. The circuit court's finding is inconsistent with the preponderance of law.

The State has an obligation to preserve physical evidence it intends to introduce into evidence at trial. Secs. 971.23 (4) and (5), Wis. Stats., State v. Disch, 119 Wis. 2d 461, 351 N.W.2d 492 (1984). That duty extends to all investigative agencies involved in a case. **When evidence is destroyed**, regardless of which state agency destroys it, **that destruction is attributed to the prosecution because it taints the trial just as much as any prosecutorial misconduct would.** Giglio v. U.S., 405 U.S. 150 (1972). * * *

[page -24- **emphasis added**]

* * *

The manifest error here is that the State's destruction of the cigarette butt made it impossible for the defense to refute the State's claim that it was a hand-rolled cigarette butt found at the scene. **To have used testimony about such evidence against Mr. O'Rear deprived him of due process. U.S. ex rel Thompson v. Dye, 221 F.2d 763 (3d cir. 1955), Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968).**

III. THE CIRCUIT COURT ERRED BY QUASHING THE WRIT BECAUSE MR. O'REAR WAS DENIED DUE PROCESS SINCE THE STATE KNEW OR SHOULD HAVE KNOWN IT DESTROYED EVIDENCE YET MISREPRESENTED THAT IT LOST SUCH EVIDENCE WITHOUT EVER DISCLOSING THE TRUTH TO THE TRIAL COURT.

* * *

[page -25- **emphasis added**]

* * *

IV. THE CIRCUIT COURT ERRED BY QUASHING THE WRIT OR ERROR CORAM NOBIS BECAUSE MR. O'REAR WAS DENIED DUE PROCESS SINCE THE STATE DESTROYED POTENTIALLY EXCULPATORY EVIDENCE IT USED AGAINST HIM AT TRIAL.

The State deprives the criminal defendant of due process when it fails to preserve evidence that is potentially useful

[page 26- **emphasis added**]

to him if the significance of the evidence was apparent before the destruction and if the defendant lacked alternative means to obtain comparable evidence. **Arizona v. Youngblood, 488 U.S. 1051,** 109 S.Ct. 333, 336-7, 102 L.Ed.2d 1007 (1988), State v. Bauer, 123 Wis. 2d 444, 368 N.W.2d 59 (Ct. App. 1985).

APPENDIX HH

[This document is presented as per S.C. Rule 14.1(h) **SOLEY so as TO ESTABLISH how the FEDERAL QUESTION was RAISED in the State Courts BELOW** THEREFORE, Here is set forth excerpts from the Document filed **August 5, 1991** with the (State of Wisconsin) **Court of Appeals**, District IV, in re: **Case no. 91-0832 - O'REAR v. STATE - Reply Brief of Plaintiff-Appellant in Support of *Coram* Appeal**]

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V. CONCLUSION 12

[page -10- **emphasis added**]

The State had the burden to prove guilt beyond a reasonable doubt at trial. Mr. O'Rear had the right to presume that the State would give him a fair trial and would represent its evidence accurately. Any criminal defendant should be able to rely on the State to act honestly and responsibly when it presents its evidence and testimony. It was not Mr. O'Rear's burden to discover that the State destroyed its "evidence" more than 4-1/2 months before trial. Instead, **it was the State's duty to actively search for the cigarette butt and to inform the Court about the destruction. Giglio v. United States, 405 U.S. 150 (1972), Napue v. Illinois, 360 U.S. 264 (1959). It was wrong for Asst. District Attorney Antoine to misrepresent such evidence as lost or missing** (R1, pp. 40, 66) since a minuscule amount of effort, consisting of a quick perusal of property tags, would have apprised him that the State destroyed the cigarette butt.

* * *

APPENDIX II

[This document is presented as per S.C. Rule 14.1(h) **SOLEY so as TO ESTABLISH how the FEDERAL QUESTION was RAISED in the State Courts BELOW** THEREFORE, Here is set forth excerpts from the Document filed **April 20, 1992** with the **State of Wisconsin Supreme Court** (discretionary high court) in re: **Case no. 91-0832 - O'REAR v. STATE - PETITION FOR REVIEW of *Coram* appeal**]

[page -6- - **emphasis added**]

STATEMENT OF CRITERIA WARRANTING SUPREME COURT REVIEW

Petitioner Terry J. O'Rear respectfully submits that review of this case by the Wisconsin Supreme Court is made necessary by Wis. Stat.§ 809.62 (1), because:

(a) a real and **significant question of federal constitutional law is presented** by this Petition for Review; . . .

* * *

[page -12- **emphasis added**]

ARGUMENT

I. WHEN THE STATE DESTROYS EVIDENCE MATERIAL TO THE QUESTION OF GUILT OR INNOCENCE, PRIOR TO TRIAL AND AFTER A DEFENDANT'S REQUEST FOR PRODUCTION OF SUCH EVIDENCE, ORAL TESTIMONY ABOUT THE DESTROYED EVIDENCE MUST BE EXCLUDED IF THE DESTRUCTION OCCURRED UNDER CIRCUMSTANCES SUGGESTING BAD FAITH.

The United States Supreme Court has long held that the United States Constitution imposes

upon law enforcement officials the duty to preserve and make known to a criminal defendant certain types of evidence. The purposes behind this duty were explained in **California v. Trombetta, 467 U.S. 478, 104 S. Ct. 2528 (1984):**

> **Under the Due Process clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness.** We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed "what might be called a constitutionally guaranteed access to evidence." [citation omitted] Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system . . . A defendant has a constitutionally protected privilege to obtain from the prosecution evidence that is . . . material to the guilt of the defendant . . .

Trombetta, 104 S.Ct. at 2532 (emphasis added).

Under the standard announced by the Supreme Court in Trombetta, a criminal defendant is denied his or her rights under the Fourteenth Amendment if the State deprives the defendant of the opportunity to present a complete defense. Here, the State's indefensible destruction of the only piece of physical evidence possibly linking petitioner to the scene of the alleged sexual assault deprived him of any meaningful opportunity to rebut the State's witnesses' testimony regarding that evidence. The

---

[page 13 - **emphasis added**]

admission of that testimony was erroneous and constituted reversible error since it cannot be said,

beyond a reasonable doubt, that admission of the evidence was harmless.

1. The State Has an Affirmative Obligation to Preserve Evidence That Is Constitutionally Material or that Could Affect the Credibility of a Witness.

a The Cigarette Butt Was Constitutionally Material Evidence.

The State has the obligation to preserve physical evidence which is "constitutionally material" to the question of guilt. Trombetta, 104 S.Ct. at 2534. The Supreme Court has defined constitutionally material evidence as that which 1) possesses an apparently exculpatory value before being destroyed and 2) is of such a nature that a criminal defendant would be unable to obtain comparable evidence to utilize in presenting his or her defense. Id. The destroyed evidence in petitioner's case meets both elements of this test.

* * *

APPENDIX JJ

[Here are set forth portions of the Official Transcript including the **conclusions of law orally given and transcribed** made at the **Sentencing Hearing**, held **April 27, 1981** before **the original Trial Court** -Dane County (State of Wisconsin) Circuit Court, Branch 6 (Judge J.C. Boll) in **State of Wisconsin v. O'Rear, Case # 80-CF-14**; Numbered Below as document # **R-75**] [also filed as Exb 9 to *Coram* Petition, App. AA, *supra*]

- [page 148 - emphasis added] -

[COURT'S CONCLUDING SENTENCING STATEMENT - Continued]

* * *

It's my belief, therefore, not starting from the end of the spectrum started by Mr. Moore, but starting from the other end, the other side of the spectrum, that being whether or not probation should be granted, it's my belief, on the basis of the nature of the offense itself, that while arguments have been made here today that probation is something that should be considered, that the Court would be ill-advised to accept those positions, and would be ill-advised to accept those recommendations. The Court, therefore, does not, after considering probation, believe that probation should be the position the Court would take in this case.

This Court is of the belief, considering all of the facts involved, and in considering also the statement of the victim, wherein you indicated, as she said, "I had to see if I was man enough to rape a woman," which remarks this Court finds repugnant, that prison is the only alternative which is acceptable under these situations.

* * *

APPENDIX KK

[Here are set forth portions of the **Official Transcript of the Jury Trial** in State of Wisconsin v. O'Rear, **# 80-CF-14** before Dane County (State of Wisconsin) Circuit Court, Branch 6 (Judge J.C. Boll) **Jan. 7, 1981, a.m.** [day 2]; No'd Below as document **# R-72**] [filed, in part, as Ex 6 to *Coram* Pet., App. AA, *supra*] [**Note: full text of each selected page is presented**]

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[CROSS-EXAMINATION]

[Questioning by: Defense Atty. George B. Strother]
[Answers by: **State's Expert Witness, Ms. Karen Doerfer, Wisc. Crime Lab analyst**]

[Question - continued from page 14]
male who is having intercourse will release this even before his releasing any sperm; is that a fact?

A That's my understanding, yes.

Q And in your report you don't indicate finding the presence of any seminal material on the complainant's slacks or corduroy pants, is that a fact?

A I found acid phosphatase on the pants and also on one of the vaginal cervical smears.

Q That doesn't indicate that in this report, does it? A The chemical substance was inconclusive; that means to me that I found acid phosphatase but I could not confirm that with seminal material.

Q Okay. Now there is a manner in which people like yourself or hospitals or doctors can determine a particular type or category for a person's blood; is that correct? A That's correct.

Q And in many cases you do that by examining seminal fluids, you can type the seminal fluid much as you would blood? A Yes.

Q And you can make a comparison between the seminal fluid type and the blood type?

A Yes, if they are secreted.

Q And you weren't able to do that in this case?

A Right.

Q Now you examined these articles of clothing, did you not, [*pp. 16-19 omitted*]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - Jan. 7, 1981, a.m. (Jury Trial, day two)
Numbered Below as document # **R-72**]

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[CROSS-EXAMINATION]

[Questioning by: Defense Atty. George B. Strother]
[Answers by: **State's Expert Witness, Ms. Karen Doerfer, Wisc. Crime Lab analyst**]

[Question - continued from page 19]
intact after a longer period of time than that in an alleged attack?

A None personally, not in a live victim. In some dead victims that we have found, there have been found some alive in a longer period of time; it would depend on the state or the environmental conditions.

Q And again, it's correct that in examining in this case the blood, saliva, stains, cervical swabs, vaginal smears, in no case was your examination -- did your examination allow you to determine to make any typing of secretor status so as to show that Mr. O'Rear's semen was present in Miss Tuman?

A That's correct.

MR. STROTHER: Thank you.
THE COURT: Mr. Antoine.

REDIRECT EXAMINATION BY MR. ANTOINE:

Q Can you tell me, in your experience in examining rectal swabs, is it out of the ordinary that no spermatozoa were found if in fact there was penetration there?

A Due to the high bacteria in the anal area, it's not unusual not to find spermatozoa because the bacteria would attack the sperm and break them down.

Q So even if there was penetration, you still might not find that; is that what you are telling me?

A That's correct. [*pp.21-26 omitted*]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - Jan. 7, 1981, a.m. (Jury Trial, day two)
Numbered Below as document # **R-72**]

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[DIRECT EXAMINATION]

[Questioning by: Asst. Dist. Attorney, Donald Antoine]
[Answers by: **State's Witness, Mr. Dale Murray, Complainant's friend**]

Q Do you recall what time that party broke up?
A About 3:30.
Q And can you tell me what occurred at that point in time?
A Well, we were going back to Sandy Reynold's apartment on Gammon Road and me, Sandy, Nina Tuman, and Frank Peppin (ph.) were going to ride in my truck there and O'Rear offered Miss Tuman a ride. And she decided to go with him because of the cramped quarters.
Q In fact, did she ride with Mr. O'Rear?
A Yes.
Q Can you describe how you drove back toward Sandy R[e]ynolds?
A Well, it was a ways and they followed us. They were going to follow us to make sure that, you know, that they got the right directions.
Q What happened next?
A Well, we were driving along and we got -- they were following us most of the way and we got to the Gammon Road turnoff and we realized that they weren't following us.
Q Did you do anything?
A Well, we stopped for awhile and then we decided to go to the apartment and wait.

MR. ANTOINE: I have no other questions, Your Honor.

THE COURT: Mr. Strother

[testimony continues on next Appendix page]

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[Questioning by: Defense Atty. George B. Strother]
[Answers by: **State's Witness, Mr. Dale Murray, Complainant's friend**]

CROSS-EXAMINATION BY MR. STROTHER:

Q Mr. Murray -- you said that Miss Tuman drove with Mr. O'Rear after the party due to the cramped quarters; I believe that was your statement, was it not?
A (Nodding)
Q He has to get words, not gestures.
A Yes.
Q You had just a pickup truck?
A Yes.
Q This was a regular, three-passenger cab?
A Yes.
Q And these quarters were cramped with four people in there; is that what you were saying?
A Yeah, it is.
Q The road conditions were unfavorable that night, were they not, or don't you recall?
A Fair -- I don't believe that it snowed or anything -- I don't recall for sure.
Q Do you remember the presence of some kind of marijuana-smoking pipe on the table in the room where the party was being held?
A Yes.
Q Do you remember a supply of marijuana on the table there also next to the pipe?
A I don't recall that.

[testimony continues on next Appendix page]

[CROSS-EXAMINATION]
[Questioning by: Defense Atty. George B. Strother]
[Answers by: **State's Witness, Mr. Dale Murray, Complainant's friend**]

Q It's possible, but you are not sure?
A Yes.
Q And at this point you are not sure whether you remember anybody using that pipe or supplying marijuana?
A Right.
Q It could have happened?
A It could have.

MR. STROTHER: That's all, thank you.
THE COURT: Mr. Antoine?
MR. ANTOINE: No other questions, Your Honor.
THE COURT: That's all.
(Witness excused)
MR. ANTOINE: Your Honor, that concludes the witnesses I would present. I would move the exhibits we have had so far into evidence.
THE COURT: The exhibits are 1 through 15. Any objection to those, Mr. Strother?
MR. STROTHER: I'm not sure whether 15 should be received. I think it was probably used for recollection, but for any other purposes at this time --
THE COURT: How about 1 through 14; do you have any objections to those?
MR. STROTHER: No.
THE COURT: 1 through 14 are received and

[statement continues on next Appendix page]

[Statement by THE COURT continued]:

the State rests.

Mr. Strother, do you desire to have a recess at this point?

MR. STROTHER: If we could.

THE COURT: Mr. Bailiff, if we could have a fifteen minute recess.

(WHEREUPON, a recess was taken at 9:55 a.m.)

THE COURT: Any motions, Mr. Strother?

MR. STROTHER: Yes, sir.

THE COURT: Mr. Antoine, we would appreciate your assistance here, if we could.

MR. ANTOINE: Yes, Your Honor.

MR. STROTHER: Judge, I have a motion at this time and perhaps it's not what you are expecting. I am going to move to strike the testimony of Ms. Mary Jo O'Donohue with regard to the finding of the cigarette butt of some kind on the evening after that alleged attack occurred. I thought that it would be proper and appropriate to wait until the end of the State's case to see if the State intended to introduce that cigarette butt into evidence. I think it's a key item of the evidence and they have not produced it today if in fact it existed. And without producing that and identifying that in Court, I think the testimony is improper and should be stricken.

THE COURT: That motion is denied. She

[statement continues on next Appendix page]

- [page] 31 -

[Statement by THE COURT continued]:

can testify as to what she found. If the State doesn't have it, it goes to the weight of the testimony. We don't have to bring in an elephant if the State testifies to one.

MR. STROTHER: Okay.

THE COURT: All right. Let's continue this recess.

(WHEREUPON, a recess was taken)

(Trial resumed at 10:28 a.m.)

THE COURT: Mr. Bailiff would you get the jury, please.

(JURY entered the courtroom)

THE COURT: Please be seated. Mr. Strother.

MR. STROTHER: Yes, Your Honor, we are ready to proceed at this time and we will call Mr. Bill Watson.

WILLIAM WATSON

called as a witness on behalf of the defense, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. STROTHER:

Q State your name, please?
A William Watson.
Q Where do you live, Mr. Watson?
A 1720 Morgan Terrace, Beloit, Wisconsin.
Q Are you employed at this time?
A That's correct.

[*pp. 32-33 omitted*]

[DIRECT EXAMINATION]

[Questioning by: Defense Atty. George B. Strother]
[Answers by: **Defense Witness, Mr. William Watson, former policeman and State licensed private investigator**]

Q And did she [*Miss Ruth Schultz*] at any time indicate when that party ended?
A Yes, sir. She said about 3:00 a.m.
Q Did you inquire of her whether or not there was any kind of marijuana pipe in use at the party?
A I asked about some possible drug use; she referred to what is known as a bong being on the table.
Q What do you understand to be a bong?
A It's my understanding that a bong is a marijuana pipe.
Q And did she indicate that there was some marijuana in that pipe present?
A Yes.
Q And she said there was?
A There was indeed, the one on the table.
Q Did she indicate that it was being used?
A She indicated that it was being used, but she did not indicate by whom.
Q Did you inquire of her whether she had any time observed some kind of small bottle in the possession of the complainant in this case, Nina Tuman?
A Yes. I asked her about a bottle that was referred to as Rush to me, and about the bottle being thrown.
Q Did Miss Schultz use any word to describe that bottle; did she -- what did she call that bottle?
A She called it Rush. I think I possibly referred to it as a bottle; it may have been a vial.

[testimony continues on next Appendix page]

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[DIRECT EXAMINATION]

[Questioning by: Defense Atty. George B. Strother]
[Answers by: **Defense Witness, Mr. William Watson, former policeman and State licensed private investigator**]

Q And did she indicate in whose possession this bottle was at any time?
A Yes.
Q And in whose possession was it in?
A Nina Tuman's.
Q And did you ask her if she had thrown or if Ms. Tuman had thrown or tossed that bottle at Miss Schultz?
A She said that Ms. Tuman had thrown that bottle and had struck her lip and had given her a fat lip.
Q Did you have an occasion to inquire of Miss Schultz as to whether she had observed Ms. Tuman with any young man on the previous evening?
A I asked her about Ms. Tuman and about the evening before and if Ms. Tuman was possibly with a male companion the evening before. And she said that she was, but she didn't want to give me the man's name or the individual's name.
Q You asked her for the name --
A -- and she said, I shouldn't give it to you, or words to that effect.

MR. STROTHER: Thank you.

CROSS-EXAMINATION BY MR. ANTOINE:

Q Is it my understanding from your conversation with Ruth Schultz in this matter that you got no evidence that Nina Tuman was consuming any sort of controlled substance; isn't that correct? [*pp. 36-41 omitted*]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - Jan. 7, 1981, a.m. (Jury Trial, day two)
Numbered Below as document # **R-72**]
- [page] 42 -
[DIRECT EXAMINATION]
[Questioning by: Defense Atty. George B. Strother]
[Answers by: **Defense Witness, Mr. Tito Castillo, Filipino national and roommate of defendant**]

[cont'd statement by Asst. D.A., MR. ANTOINE]
I don't think he is testifying to the width of the console itself; it may be somewhat less.
THE COURT: All right.
MR. STROTHER:

Q And it has some type of shifting type of mechanism on the console?
A Yes, it's a shift lever there, right.
Q Was there any conversation taking place while sitting in the car waiting for this truck to appear?
A Oh, yeah.
Q Do you recall what the conversation was?
A She, Nina, offered us a, you know, a brown bottle. She likes to -- Nina told us that you guys like to get high? So I says, no, I don't like to get high and what is that. It's a kind of a glass, and she says, Rush, and Terry declined.
Q Do you know if Ms. Tuman at that point used any of this substance or inhaled any of it?
A It was pretty dark and she was sitting in the back.
Q Could you see whether she was doing any or not?
A I saw the bottle, but I don't know.
Q Okay. And was any marijuana smoked in the car while you were waiting there?
A Yeah, Terry didn't like it, so he rolled a marijuana joint.
Q And did Terry smoke any of it?

[testimony continues on next Appendix page]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - Jan. 7, 1981, a.m. (Jury Trial, day two)
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[DIRECT EXAMINATION]

[Questioning by: Defense Atty. George B. Strother]
[Answers by: **Defense Witness, Mr. Tito Castillo, Filipino national and roommate of defendant**]

A Yeah.
Q How about Ms. Tuman, did she smoke any of the marijuana cigarette?
A Yeah.
Q Do you recall how much of the cigarette she smoked?
A They smoked it until the pickup arrived and until I drove to East Johnson.
Q Okay. Was the cigarette passed back and forth between Ms. Tuman and Mr. O'Rear from the front seat to the back?
A So I could notice it, it's at my side.
Q One time or more than one time?
A I think more than once; its a long one, it's a long --
Q The cigarette was about, say, three inches long?
A Yeah, it's a cigarette paper.
Q Now did this pickup truck arrive at some point?
A Yeah, So --
Q What did you do then?
A Okay. So I drove going to East Johnson, so they are following me. And then there is a siren --
Q A siren?
A Yeah. So they pulled out to the side, but I'm in the head so I go straight ahead and then --
Q Were they held up by this fire truck?
A Yeah, and then when I - -
Q Did you stop at any point on Johnson Street to wait for [*pp. 44-52 omitted*]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - Jan. 7, 1981, a.m. [Jury Trial, day two]
Numbered Below as document # **R-72**]

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[CROSS-EXAMINATION]
[Questioning by: Asst. Dist. Attorney, Donald Antoine]
[Answers by: **Defense Witness, Mr. Tito Castillo, Filipino national and roommate of defendant**]

A Yeah, he is to my right side.
Q And Nina Tuman is in the back seat?
A Right.
Q Who lit the marijuana cigarette?
A Terry.
Q Besides, well, let me ask you: Is that a rolled cigarette; you roll it with cigarette papers?
A Yeah, you roll it.
Q Does he roll his own tobacco cigarettes, also?
A Yeah.
Q And you have seen him do that in the past?
A Yeah, at home.
Q What does he normally use; does he use pipe tobacco?
A No, he uses -- it's a cigarette rolling tobacco.
Q Is that kept in a pouch, a little pouch-package?
A Yeah.
Q Back to the marijuana cigarette, your statement from what I understand it, is that you are not sure how many puffs, how many times Nina Tuman took from that cigarette, are you?
A They finished the joint.
Q You don't know how many times; you just know that the joint was finished?
A Yeah.
Q But you don't know how many times Nina Tuman took a puff of that cigarette; isn't that right? [*pp. 54-61 omitted*]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - Jan. 7, 1981, a.m. [Jury Trial, day two]
Numbered Below as document # **R-72**]

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[DIRECT EXAMINATION]

[Questioning by: Defense Atty. George B. Strother]
[Answers by: **Mr. Terry O'Rear, defendant**]

[Answer continued from page 61]
teach there--

Q And --

A And I study there.

Q And you are a professor or an instructor?

A I am an instructor, a teaching assistant. And I have about 68, maybe -- or what is it, 63, something like that -- students that I take care of there. I meet with them and we talk, you know.

Q Are you furthering your education while you are there?

A I am working on a doctorate degree. I have a masters degree from here.

Q At the University of Wisconsin?

A Yeah.

Q And in what field is your doctorate degree in, or you hope to have in?

A Yeah, I hope. I have been working on it five years. And I specialize in Western European politics and International relations with a third area being American politics.

Q Were you living in Madison on or about January 1st of 1980?

A Yes, sir.

Q Do you have a family in this area?

A What do you mean by family?

Q Parents or brothers or sisters.

A No, my parents live in Minnesota.

Q What was your employment or student status as of

[testimony continues on next Appendix page]

[DIRECT EXAMINATION]
[Questioning by: Defense Atty. George B. Strother]
[Answers by: **Mr. Terry O'Rear, defendant**]

[Question continued from page 62]
approximately January 1st of 1980?

A Okay. I was a full-time graduate student at the University of Wisconsin in political science. I was also employed at the time for the Center for Public Policy which was located at the Gilman Street Poly Sci. Department. I was working on insurance policies. They were doing a research study of the policies for the elderly and they were trying to regulate those insurance policies. And I was working there and we were, like, checking out insurance policies from four states to try to, you know, regulate that industry so that old people aren't taken advantage of. And I also had been retained by Beloit College which is in Beloit, Wisconsin, by their Department of Government and I had been requested -- I signed a contract to teach a course there on European politics. I taught a course there last year in the spring -- two classes.

Q Now did you have occasion any time on January 1st of 1980 to go to the Headliner's Bar in Madison?

A Yeah.

Q What time did you go to that tavern?

A I think, you know, we must have got there around 10:00, 10:30, something like that.

Q And did you consume any beer or other alcoholic beverages while you were there?

[*pp. 64-68 omitted*]

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[DIRECT EXAMINATION]
[Questioning by: Defense Atty. George B. Strother]
[Answers by: **Mr. Terry O'Rear, defendant**]

[Answer continued from page 68]
and to Tito. Tito declined and Nina smoked it.

Q And you said that you were offered some Rush?

A Yes.

Q What is -- what were you actually offered in terms of a chemical description?

A Nina had this bottle that she pulled out, a little brown bottle. She opened it and she says, do you want some of this Rush. And I said, that's stuff from gay discos, right. And she goes, yeah, do you want some. And I go, no, that's not for me. And she took some and then she offered some to Tito and he declined. That's when I brought out the marijuana, because I don't want to use chemicals. They are bad for your head.

MR. ANTOINE: Your Honor, I object to that conclusion. There is no expertise here. I ask that that be stricken and that you instruct the jury to disregard it.

THE COURT: The jury should disregard that statement that Mr. O'Rear just made -- the jury should not regard that statement as having an experts' backing to it.

MR. STROTHER:

Q So, did you observe Ms. Tuman at that time using this inhalent?

A Yes, sir.

Q Now did this other vehicle eventually pull up behind yours?

A Okay. The pickup -- Headliner's is on University, right. [*pp. 70-75 omitted*]

[DIRECT EXAMINATION]

[Questioning by: Defense Atty. George B. Strother]
[Answers by: **Mr. Terry O'Rear, defendant**]

Q And were there alcoholic beverages being consumed?
A Yeah, like I said, the people had bought some beer. There was some beer left over from the party the night before in the refrigerator because that's where Nina got me the beer from. And the other stuff they put in there to cool off.
Q Did you consume any beer?
A I was given a beer like I said. I think maybe at the most I drank half of it because I didn't drink because they provided us with pot.
Q Now did the other participants consume any beer?
A Yeah, I think so.
Q Were there any that you remember that specifically did not consume any beer?
A I think everybody had a beer; they passed it out, you know.
Q And --
A I don't distinctly recall anybody declining it. It could be.
Q Did -- you said there was some marijuana there at the party?
A Yes, on the coffee table which I indicated on the thing. It was a bong which was sitting on the left hand edge of it and a bag, you know, full of green stuff, marijuana. That was put into the bong and smoked.

[testimony continues on next Appendix page]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - Jan. 7, 1981, a.m. (Jury Trial, day two)
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[DIRECT EXAMINATION]
[Questioning by: Defense Atty. George B. Strother]
[Answers by: **Mr. Terry O'Rear, defendant**]

Q And was there anybody -- do you recall anybody there at the party, any of the participants, who did not consume any marijuana?
A I'm almost positively certain everybody at the party smoked, including myself, perhaps with the exception of Frank.
Q That was Mr. Peppin (ph.)?
A Frank Peppin (ph.) who is bl[o]nd.
Q And --
A He was into beer, you know.
Q Did you ever see this brown bottle of inhalent, this Rush again at the party?
A Yeah.
Q And was there any time when Ms. Tuman consumed any of that during the party?
A Yes, because we talked about it there. It was used not only by Ms. Tuman, but by other people too.
Q Now how did this party -- how did it end? Did anything happen that you remember to cause the party to end.
A Yeah, I do. It was a really strange party ending. Nina had this Rush -- she called it Rush -- and she was looking for it. Again, she had been using it pretty much throughout the night and they couldn't find it. She first accused -- excuse me, she accused Brad of having the Rush and then she went and looked through Ruth's purse which

[testimony continues on next Appendix page]

[DIRECT EXAMINATION]
[Questioning by: Defense Atty. George B. Strother]
[Answers by: **Mr. Terry O'Rear, defendant**]

[Answer continued from page 77]

was right in front of Ruth. And she found it and took it and threw it at Ruth and hit her and it gave her a puffed lip. That's when the party ended, because it was, like, bad vibes, bad feelings, you know. That's when they left.

Q And who left the house at that time? Who left the house then at the end of the party?

A At the end of the party everybody that was there except for Ruth and Brad, except for Ruth and Brad.

Q And so Ms. Tuman went outside; is that true?

A Right.

Q And you went outside?

A Yeah, I was, like, the last because I was concerned for Ruth because she had a puffed lip and she went into the bathroom to get something cold to put on it. And we went outside and Nina asked if she could ride with me because it was crowded in that pickup truck so we drove off. I followed the pickup truck.

Q So Nina drove off in Mr. Castillo's car with yourself?

A That's correct.

Q Did anybody else accompany you?

A No, sir.

Q Did you follow this other vehicle for a distance?

A Yes. Okay, they had told us they lived on Gammon Road, so we would go down Fish Hatchery Road to the Beltline

[*remaining pages omitted*]

APPENDIX LL

[Here is set forth the Document filed **Feb. 29, 1980 with the original trial court** - Dane County (State of Wisc.) Circuit Court, Branch 6 (Judge J.C. Boll) in re: State of Wisconsin v. O'Rear, Case # **80-CF-14** : **Notice of Motion and Motion for Discovery]**
Numbered below as document # **R-13]**
[also filed as Exb 1 to *Coram* Petition, App. AA, *supra*]

[page 1]

STATE OF WISCONSIN — CIRCUIT COURT — DANE COUNTY

STATE OF WISCONSIN,
Plaintiff,

-vs-

NOTICE OF MOTION AND MOTION FOR DISCOVERY.

TERRY J. O'REAR,
Defendant.

TO: Dane County District Attorney
City-County Building
210 Monona Avenue
Madison, WI 53709

You are hereby notified that the defendant, Terry J. O'Rear, by his attorney, George B. Strother of Eisenberg, Giesen, Ewers & Hayes, S.C., appears specially in the Circuit Court for Dane County and will move the Court, at a time and place to be set by the Court, for the entry of an order requiring the District Attorney to, within 30 days:

(1) Disclose to the defendant any and all evidence within the possession, custody, or control of the State or its representatives, or which, by the exercise of due diligence, may become known, which may tend to exculpate the defendant or minimize his complicity in the commission of the alleged crime.

(2) Furnish the defendant with copies of all written or recorded statements of State's witnesses regarding this alleged crime, including all police officers' reports and memorandum book entries.

(3) Make known to the defendant all physical evidence, including documentary evidence, which the State intends to introduce into evidence at trial, and to produce said evidence for the defendant or his representative to inspect, copy, or photograph.

(4) Furnish the defendant a copy of defendant's own

[page 2]

criminal record.

This motion is made subject to objection to the Court's jurisdiction.

Dated this 29th day of February, 1980.

Respectfully submitted,

George B. Strother
Eisenberg, Giesen, Ewers & Hayes, S.C.
131 West Wilson Street, Suite 402
P.O. Box 2036
Madison, WI 53701
(608) 256-8351
Attorneys for Defendant.

APPENDIX MM

[Here is set forth the Document filed **Feb. 29, 1980 with the original trial court** - Dane County (State of Wisc.) Circuit Court, Branch 6 (Judge J.C. Boll) in re: State of Wisconsin v. O'Rear, Case # **80-CF-14** : **Demand for Discovery and Inspection** Numbered below as document # **R-14**] [also filed as Exb 2 to *Coram* Petition, App. AA, *supra*]

[page 1]

STATE OF WISCONSIN	CIRCUIT COURT	DANE COUNTY

STATE OF WISCONSIN,
Plaintiff,
-vs-
TERRY J. O'REAR,
Defendant.

DEMAND FOR DISCOVERY AND INSPECTION.

TO: Dane County District Attorney
City-County Building; 210 Monona Avenue; Madison, WI 53709

Pursuant to sec. 971.23 through sec. 971.25, Wis. Stats., and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 7, 8, and 11 of the Wisconsin Constitution, defendant, by his attorney, demands of the District Attorney to:

(1) Furnish the defendant with a copy of any written or recorded statement concerning the alleged crime made by the defendant which is within the possession, custody or control of the State.

(2) Furnish the defendant with a written summary of all oral statements of the defendant which the District Attorney plans to use in the course of trial. The "summary" as demanded herein, should be in the most complete form available to the State, and should cover every issue of fact or circumstance allegedly discussed between the defendant and the other party to the conversation.

(3) Furnish the defendant with the names of witnesses to all written and oral statements requested in subsections 1 and 2 of this demand.

(4) Furnish the defendant a copy of defendant's own

[- page 2 -]

criminal record and record of traffic violations.

(5) Furnish the defendant a copy of the criminal records of all prosecution witnesses.

(6) Furnish the defendant copies of any and all photographs used in the identification of the defendant.

(7) Make known to the defendant all physical evidence including documentary evidence which plaintiff intends to introduce at trial so that the defendant may make a motion pursuant to sec. 971.23(4) and (5), Wis. Stats., if defense counsel deems it appropriate.

(8) Furnish the defendant with copies of all written or recorded statements of the State's witnesses regarding the alleged offense, including all police officers' reports and memorandum book entries.

The defendant, pursuant to Brady v. Maryland, 383 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), State v. Stanislawski, 63 Wis.2d 730, 216 N.W.2d 8 (1973), and State v. Wold, 57 Wis.2d 344, 204 N.W.2d 482 (1972) hereby demands any and all exculpatory evidence in the custody of or available to the State, such evidence to include but not limited to lab reports, hospital reports, police reports, the District Attorney's file, physical evidence, statements of witnesses, etc., which would tend to:

(a) Affect the weight and credibility of evidence used against defendant; or

(b) Negate the guilt of the defendant or mitigate the degree of offense charged or to reduce the defendant's punishment therefor; or

(c) Form the basis for further investigation.

Dated this 29th day of February, 1980.

George B. Strother
Eisenberg, Giesen, Ewers & Hayes, S.C.
Attorneys for Defendant.

APPENDIX NN

[Here are set forth portions of the **Official Transcript of the Jury Trial** in State of Wisconsin v. O'Rear, # **80-CF-14** before Dane County (State of Wisconsin) Circuit Court, Branch 6 (Judge J.C. Boll) **Jan. 6, 1981** [day one]; No'd Below as doc. # **R-71**] [filed, in part, as Ex 5 to *Coram* Pet., App. AA, *supra*] [Note: unless indicated by * * *, the full text of each selected page is presented]

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[State of Wisconsin v. O'Rear, # 80-CF-14
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- [page 13]-

[DIRECT EXAMINATION]
[Questioning by: Asst. Dist. Attorney, Donald Antoine]
[Answers by: **Ms. Nina Tuman, complainant**]

[Answer -continued from page 12]
Whalers.

Q Can you tell me, did that title catch your eye?
A Yes.
Q Why was that?
A I like the Whalers. It was just playing the whole time.
Q Was there any discussion concerning controlled substances?
A I'm not sure what you mean.
Q Well, was there any discussion concerning marijuana?
A Yeah, he offered me a joint of Hawaiian which he lit up in the car and asked me if I wanted to smoke it. I took one puff and didn't want to smoke anymore and he smoked the rest by himself.
Q Was that a full-size cigarette?
A Yeah.
Q And did he consume the entire thing other than the puff that you took?
A I think so.
Q Did you notice what type of cigarettes he smoked when you were with him that night?
A He rolled his own cigarettes. He had like a pack of tobacco that he rolled them out of.
Q He carried that tobacco in a pack, you say?
A A pouch with rolling papers.
Q Do you recall what that packet looked like?
A No.

[*page 14 omitted*]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Jan. 6, 1981** (Jury Trial, day one)
Numbered Below as document # **R-71**]

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[DIRECT EXAMINATION]
[Questioning by: Asst. Dist. Attorney, Donald Antoine]
[Answers by: **Ms. Nina Tuman, complainant**]

[Answer -continued from page 14]
we were playing trivia games and we were singing songs, it was just friendly.
Q Do you recall what time you arrived at the Johnson residence?
A I think at 1:30.
Q And do you recall how long you were there?
A Yeah, we left at 4:00.
Q Now while you were at the Johnson residence, did you consume any other intoxicants such as beer?
A Yeah, I had, I think, one or two more beers.
Q Do you know where those beers came from?
A I'm not sure; they had some there and I believe on the way to the party we stopped and picked up a six pack.
Q Was there anything else consumed besides the two beers that you have stated?
A No.
Q Do you know if there was any controlled substances such as marijuana at the party?
A No.

MR. STROTHER [Defense Attorney]: Is that you don't know or there wasn't any?

MR. ANTOINE: Your Honor, please. He's entitled to cross-examine, but --

THE COURT: If you have an objection, please make an objection.

MR. STROTHER: Go ahead.

[*page 16 omitted*]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Jan. 6, 1981** (Jury Trial, day one)
Numbered Below as document # **R-71**]

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[DIRECT EXAMINATION]
[Questioning by: Asst. Dist. Attorney, Donald Antoine]
[Answers by: **Ms. Nina Tuman, complainant**]

[Question - cont'd from p. 16] the party ceasing?

A Sandy Reynolds looked at the clock and she saw that it was 3:00 and she just went, "Oh, my God." She had to get home; she had a child that someone was taking care of.

Q Did you have any discussion with Ruth Schultz before the party ended that you recall?

A No.

Q Did you have any conversation with her in a less than friendly tone?

A No.

Q Could you tell me what if anything occurred between yourself and Ruth Schultz on that evening out of the ordinary?

A Nothing, really.

Q How long have you known her?

A About three years, four years.

Q Was she a roommate of yours, also?

A Yes.

Q Now where was she staying; was she staying separately from where you and Sandy were staying?

A She was staying at Sandy's, too. That night she stayed at Brad Johnson's house.

Q Did you have means of transportation to get home?

A Yes.

Q And what transportation were you assuming you would use?

A Dale Murray and Frank Peppin, which are friends and they had [*pp. 18-24 omitted*]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Jan. 6, 1981** {Jury Trial, day one}
Numbered Below as document # **R-71**]

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[DIRECT EXAMINATION]
[Questioning by: Asst. Dist. Attorney, Donald Antoine]
[Answers by: **Ms. Nina Tuman, complainant**]

A After that he tried to enter me; he just kept ramming at me and he kept saying I was so tight that it was like raping a virgin.
Q Were you tight at that point?
A Yes.
Q Were you afraid at that point?
A Yes. I was also shaking because I was so scared. And he started to say, "Oh, you're starting to tremble."
Q Could you tell me, was your vaginal area dry or wet?
A Dry.
Q And did the defendant have any difficulty in trying to enter you?
A Yes.
Q Did he succeed in entering you?
A Yeah, after about five minutes or so.
Q What happened after that?
A After about another five minutes, he tried to enter my anus and he couldn't. And he kept sticking his fingers into my anus. And I kept saying that I have to go to the bathroom. He said, "Oh, that would be great. Why don't you shit and rub it all over me. That would be really good." And he kept trying and he couldn't enter.
Q What occurred next?
A Then he went back into my vagina and continued that. And then when he was about ready to come, he said, "I'm not

[*pp. 26-33 omitted*]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Jan. 6, 1981** [Jury Trial, day one]
Numbered Below as document # **R-71**]

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[CROSS EXAMINATION]
[Questioning by: Defense Atty. George B. Strother]
[Answers by: **Ms. Nina Tuman, complainant**]

[Question -continued from page 33]
before and had partied that night, isn't that true?
A Yes.
Q And so you were up late that night and the night before because it was New Year's Eve?
A Yes.
Q And you did smoke some marijuana in Mr. O'Rear's car; is that correct?
A One puff.
Q Just one puff?
A Uh-huh.
Q And it's your testimony that there was no marijuana at the party?
A I don't recall any.
Q You don't recall. You don't remember anybody using marijuana?
A No.
Q You didn't use any marijuana?
A No.
Q Was there a marijuana pipe there?
A There was one on the table. It was like a glass thing, water pipe or bong or something.
Q But there was no marijuana there?
A No.
Q And you had some beer at the bar?
A Yes.
Q And how many was that?

[*page 35 omitted*]

[CROSS EXAMINATION]
[Questioning by: Defense Atty. George B. Strother]
[Answers by: **Ms. Nina Tuman, complainant**]

A Uh-huh.
Q Did you consume any [beer] in the car?
A No.

THE COURT: Mr. Swingle, can you hear what the witness is saying?

MR. SWINGLE [a jury member]: Yes.

MR. STROTHER:

Q Were there any other drugs, substances consumed at this party other than marijuana or beer?
A No.
Q You don't remember that, you don't remember consuming drugs from an inhaler bottle?
A No.
Q You didn't have a little inhaler bottle that was filled with any drugs, substances?
A There was one there.
Q What was it?
A It's called an odorizer; they sell it over the counter.
Q They call it Rush, don't they?
A That was not Rush.
Q You didn't have any of that?
A No.
Q You're saying that that's not a drug substance?
A Well, its not illegal, I guess is what I'm saying.
Q You didn't have any of that of your own?

[testimony continues on next Appendix page]

[CROSS EXAMINATION]
[Questioning by: Defense Atty. George B. Strother]
[Answers by: **Ms. Nina Tuman, complainant**]

A The bottle was mine; I didn't do any.
Q You didn't consume any in the car when you were first riding with Mr. O'Rear?
A No.
Q You didn't offer that to Mr. O'Rear or his companion?
A No.
Q Now you first made contact with Mr. O'Rear at the Headliners tavern --
A Yeah.
Q -- and you watched him play one of those electronic games?
A Yes.
Q And you started a conversation with Mr. O'Rear at that point; isn't that right?
A Yes.
Q And you invited him to the party?
A He asked if him and his roommate might -- could come and I asked my friends and they said it was all right.
Q And you didn't actually invite him?
A No, he asked first.
Q Do you remember giving a statement to the police shortly after this alleged offense occurred?
A Yes, I did. Right after I read that statement the second time, I told the cop that indeed I did not invite him.
Q But you wrote that yourself, didn't you?
A Right after I got out of the hospital.

[*pp. 38-53 omitted*]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Jan. 6, 1981** (Jury Trial, day one)
Numbered Below as document # **R-71**]

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[REDIRECT EXAMINATION]
[Questioning by: Asst. Dist. Attorney, Donald Antoine]
[Answers by: **Ms. Nina Tuman, complainant**]

[Answer -continued from page 53]
if I wanted to do something with him. And I said, no, I was going to a party with my friends. And he said, could I call you sometime. And I said, that I lived in Chicago and I was out of town. And he said he got to Chicago now and then, could he give me a call when he was there.

Q Was there anything said or that he asked you that had to do with anything of a sexual nature?

A No.

Q Is that the other party that you were talking about?

A Yeah.

Q So at that point in time you had no indication that this was going to end up in a sexual assault?

A No.

Q You had no fear of giving him your phone number?

A No.

Q There was a couple of questions asked with regard to an inhaler. I will ask you to describe to the jury what that is that you had with you?

A It's a little bottle, like I think it's called a room odorizer. A lot of places, discos and things, sell them. In Chicago, they sell them at the discos.

It -- I suppose if you did it, it is similar to Amyl Nitrite which they give heart attack victims. If you inhale it, there is like a sixteen second rush, your heart beats faster and it's kind of a -- it's a stimulant of

[*pp. 55-90 omitted*]

THE COURT: All right, sure.
(JURY was brought in)
THE COURT: Please be seated.
MR. ANTOINE: Your Honor, the State calls Mary Jo O'Donohue to the stand.
THE COURT: Please come forward, ma'am, and be sworn.

MARY JO O'DONOHUE
called as a witness on behalf of the State, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ANTOINE:

Q Would you please state your name?
A Mary Jo O'Donohue.
Q And how do you spell your last name?
A O-'-D-O-N-O-H-U-E.
Q Could you tell me, are you currently employed by the Dane County Sheriff's Department?
A Yes, I am.
Q And how long have you been employed by them?
A About four and a half years.
Q I'll direct your attention to the date of January 3rd, 1980, and ask you if you were on duty on that date?
A Yes, I believe I started at about 11:00 p.m. on the 2nd.
Q Could you tell me, did you have occasion to receive a call from Officer Dreifke of the Dane County Sheriff's Department?

[testimony continues on next Appendix page]

- [page 61] -

[DIRECT EXAMINATION]

[Questioning by: Asst. Dist. Attorney, Donald Antoine]
[Answers by: **Dept. Sheriff Mary Jo O'Donohue**]

A Yes, I did.
Q And what was that regarding?
A He requested that I go out to the Speedway Bar in the Town of Middleton and look for some evidence.
Q Is that Speedway Bar located in Dane County, Wisconsin?
A Yes. It's just outside of the city limits of Madison.
Q And did you do to that location?
A Yes, I did.
Q And once at that location, what if anything were you instructed to do?
A I was to check -- it would be on the east side of the parking lot near the piles of tires -- for a cigarette butt and it was supposed to be one that would have been handrolled rather than rolled in a machine.
Q Did you find such a cigarette butt?
A Yes, I did.
Q And was that at the location of the Speedway Bar?
A Yeah, it was east of the Speedway Bar in the parking lot.

MR. ANTOINE: I have no other questions, Your Honor.

THE COURT: All right, Mr. Strother.

CROSS-EXAMINATION BY MR. STROTHER:

Q Where is it?
A I placed it in the evidence room of the Dane County Sheriff's Department.

[testimony continues on next Appendix page]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Jan. 6, 1981** {Jury Trial, day one}
Numbered Below as document # **R-71**]

- [page 62] -

[CROSS-EXAMINATION]
[Questioning by: Defense Atty. George B. Strother]
[Answers by: **Dept. Sheriff Mary Jo O'Donohue**]

Q It's still there?
A I don't know.
Q Did you look?
A No, I didn't.
Q Did anybody else look?
A (No response)
Q Did you ask for it?
A No, I did not.
Q Did you check with Mr. Antoine to see if it's there?
A I don't believe it is.
Q Is it lost?
A I don't know. At this point I don't know what became of it.
Q Did you have it tested in any way?
A What do you mean, tested?
[Q] Send it to the crime lab for any testing?
A No. I had it held there. This was just to be held as an item.
Q But you told them to hold it and it isn't being held now, right?
A That's correct. I'm not really certain what became of it.
Q So you didn't look for tire tracks?
A Not that I recall, no.
Q You don't know if this cigarette butt was near any tire tracks, do you?
A It was a short distance away from some tires that were in a

[testimony continues on next Appendix page]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Jan. 6, 1981** (Jury Trial, day one)
Numbered Below as document # **R-71**]

- [page 63] -

[CROSS-EXAMINATION]
[Questioning by: Defense Atty. George B. Strother]
[Answers by: **Dept. Sheriff Mary Jo O'Donohue**]

[Answer -continued from page 62]
pile. Officer Dreifke asked me to recover some evidence and that was the specific evidence which he asked me to recover.

Q This was just a cigarette butt in a parking lot of a tavern ten feet away from a pile of tires?

A That's about it.

MR STROTHER: That's all.

THE COURT: Mr. Antoine.

REDIRECT EXAMINATION BY MR. ANTOINE:

Q Did you examine that closely yourself?

A Yeah, I looked at it carefully.

Q Was there any doubt in your mind that it was handrolled?

A No. I've smoked for about fifteen years and know the difference between one cigarette that is handrolled and one that you buy in a pack.

Q Can you explain why you don't know where the evidence is now?

A Basically because I think the primary responsibility for that was with the major investigating officers rather than me, where that was the one part of the case I was involved in.

Q Do you know who those officers were?

A I believe they were Deputies Kretschman and Dreifke.

MR. ANTOINE: I have no other questions.

THE COURT: Mr. Strother.

MR STROTHER: Just a moment, Your Honor.

THE COURT: Sure.

[testimony continues on next Appendix page]

[Questioning by: Defense Atty. George B. Strother]
[Answers by: **Dept. Sheriff Mary Jo O'Donohue**]

RECROSS-EXAMINATION BY MR. STROTHER:

Q How long -- when was it that you went to look for this cigarette butt?
A I came on duty at 11:00 p.m., so it would have been in the area of midnight, the end of January 2nd and the beginning of January 3rd, I believe.
Q Okay. And the tavern was open at the time --
A That tavern --
Q -- or don't you remember?
A That tavern very frequently will close up. There weren't many cars in the area at all, but that's not uncommon with that tavern.

MR. STROTHER: Okay, thank you.

MR. ANTOINE: No questions, Your Honor.

THE COURT: That's all, ma'am, thank you.

(Witness excused)

MR. ANTOINE: The State calls Peter Brown.

THE COURT: Sir, please come forward to be sworn.

PETER BROWN

called as a witness on behalf of the State, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ANTOINE:
Q Officer, will you state your name?
A Peter Brown.

[*pp. 65-70 omitted*]

[DIRECT EXAMINATION]
[Questioning by: Asst. Dist. Attorney, Donald Antoine]
[Answers by: **Deputy Sheriff Robert Dreifke**]

A Yes, sir, she did.
Q Were you directed to any location?
A Yes, sir.
Q Where were you directed?
A Miss Tuman directed me to what we know as the Speedway Tavern located on the west side of Madison at the intersections of County Truck M and County Trunk S.
Q Can you tell me, as a result of your being there did you send any deputies out to that location?
A Yes, we did.
Q Who did you send out?
A Deputy Mary Jo O'Donohue
Q For what purpose?
A During the interview subsequent to our being at that location, Miss Tuman informed me that the suspect had rolled his own cigarettes and he may have thrown one or two of these out of the window. And at that time Officer O'Donohue was on the road and requested that she do a crime scene search to see if she could locate anything.
Q Did you have any other physical evidence secured, namely clothing and any medical specimens from the complainant?
A Yes, we did.
Q How was that done?
A After I had taken her to the Methodist Hospital for an examination, Deputy Burke from our office responded there at

[*pp. 72-82 omitted*]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Jan. 6, 1981** (Jury Trial, day one)
Numbered Below as document # **R-71**]

- [page 83] -

[DIRECT EXAMINATION]
[Questioning by: Asst. Dist. Attorney, Donald Antoine]
[Answers by: **Deputy Sheriff Thomas Kretschman**]

Q Did you observe any tapes in that car?
A Yes.
Q Do you recall any of those in particular?
A There was a tape deck or receiver unit in the glove compartment and one of the tapes had something Marley and the Whalers; I don't know much more than that. It was in the tape deck.
Q Officer, when you apprehended the defendant, can you tell us whether or not he had a jacket to wear outside?
A Yes, he did.
Q Can you describe that jacket?
A I don't remember totally; I believe it was a leather jacket of some fashion and we later took it into evidence.
Q Did the defendant take any materials used for smoking cigarettes?
A Yes, he did.
Q What did he take with him?
A I believe it was pouch or whatever, pipe tobacco, and I think the pipe tobacco -- I'd be guessing, but I think there was tobacco and papers for rolling cigarettes.
Q Excuse me, that was papers?
A Yes.
Q Officer, did the defendant have any gloves that he wore?
A There were gloves involved. There I don't know if it was a complete glove or a liner -- an insert, a wool type liner

[*pp. 84-100 omitted*]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Jan. 6, 1981** (Jury Trial, day one)
Numbered Below as document # **R-71**]

- [page 101] -

[CROSS-EXAMINATION]
[Questioning by: Defense Atty. George B. Strother]
[Answers by: **State's Witness, Ms. Sandy Reynolds, Complainant's friend**]

A Yes, there was.
Q In fact, you bought some beer on the way back to the residence from Headliners?
A I don't recall buying beer; I recall being there. We bought V-8 and potato chips.
Q And do you recall that there was marijuana in a pipe laying on the table in the house?
A Yes.
Q And there was marijuana there with a pipe?
A Was there --
Q -- marijuana there with a pipe?
A I didn't see anything.
Q You were sitting in the front on a couch behind a table?
A Yes, I was.
Q There was marijuana there, wasn't there?
A I didn't see any.
Q You didn't see any?
A No.
Q You didn't smoke any?
A No.
Q Did you see Nina Tuman in possession of a little bottle of an inhalant substance called Rush that night?
A I actually do not remember seeing the bottle.
Q She had it there, you think?
A I remember something being tossed at Ruth and she said,

[testimony continues on next Appendix page]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Jan. 6, 1981** (Jury Trial, day one)
Numbered Below as document # **R-71**]

- [page 102] -

[CROSS-EXAMINATION]
[Questioning by: Defense Atty. George B. Strother]
[Answers by: **State's Witness, Ms. Sandy Reynolds, Complainant's friend**]

[Answer -continued from page 101]
"Thanks a lot, Nina." And I don't remember --
Q In other words, Nina tossed this bottle at Ruth; right, is that what you are saying?
A Yes.
Q And it hit Ruth in the lip, right?
A Right.
Q It gave her a fat lip?
A It didn't give her a fat lip, no.
Q It didn't cause any injury?
A None that I would consider an injury.
Q None that you would consider an injury?
A A swollen lip -- she didn't get a swollen lip from it.
Q What was this bottle?
A That was known -- I'm not even sure what it was; I don't know.
Q How big was it?
A About this big. (Indicating)
Q And Nina had it in her possession, right?
A Uh-huh.
Q Did you ever do anything with it during the evening?
A No.
Q You don't remember that?
A I don't recall that, no.
Q You were apparently asleep when Nina came back to your house in the early morning hours of January the 2nd, correct?

[*pp. 103-112 omitted*]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Jan. 6, 1981** {Jury Trial, day one}
Numbered Below as document # **R-71**]

- [page 113] -

[DIRECT EXAMINATION]
[Questioning by: Asst. Dist. Attorney, Donald Antoine]
[Answers by: **State's Witness, Ms. Ruth Schultz, Complainant's friend**]

Q Did you see who left the party with whom?
A No.
Q Did you remain at that residence?
A Yes.

MR. ANTOINE: I have no other questions, Your Honor.

THE COURT: Mr. Strother.

MR. STROTHER: Just a moment, Your Honor.

THE COURT: Surely.

CROSS-EXAMINATION BY MR. STROTHER:

Q What time did this party end?
A Like 3:56, 3:59 a.m.
Q Do you remember having a conversation with an investigator who I had call you on the phone some months ago?
A Yes.
Q Do you remember telling him that the party ended at 3:00?
A No.
Q You don't remember that?
A I don't recall.
Q That's what I asked you, do you recall that.
A "Do you recall that." Do I recall if I was called by an investigator and if I said the party ended at 3:00; that's what you're asking me?
Q Yes, that's what I am asking.
A I don't believe I said 3:00 because I remember distinctly

[testimony continues on next Appendix page]

[State of Wisconsin v. O'Rear, # 80-CF-14
Transcript - **Jan. 6, 1981** {Jury Trial, day one}
Numbered Below as document # **R-71**]

- [page 114] -

[CROSS-EXAMINATION]
[Questioning by: Defense Atty. George B. Strother]
[Answers by: **State's Witness, Ms. Ruth Schultz, Complainant's friend**]

[Answer -continued from page 113]
because there was a digital clock on the tv set and that said it's 3:56.

Q You would have remembered just as well at the time the investigator talked to you, if not better --

A No.

Q You remember now some six months later better, perhaps?

A I feel competent to say that the party ended at 3:56, 3:59 in the morning.

Q You don't remember any marijuana being consumed at that party?

A There was none consumed.

Q Was there a marijuana pipe or bong there; do you remember that?

A I don't recall.

Q Do you recall that conversation with Mr. Watson who is the investigator who called you?

A Yes, I remember.

Q You don't recall telling Mr. Watson that there was some marijuana in a pipe on the table?

A There may have been one, but I don't recall.

Q You would remember better six months ago then you would now, wouldn't you?

A I feel competent in saying that I do not recall.

Q That wasn't my question. You would have remembered better six months ago when you talked to Mr. Watson than you do now, wouldn't you?

[testimony continues on next Appendix page]

[CROSS-EXAMINATION]
[Questioning by: Defense Atty. George B. Strother]
[Answers by: **State's Witness, Ms. Ruth Schultz, Complainant's friend**]

A I feel like you're forcing me to say that I can't remember as well now than six months ago, and I feel that what I remember right now is the same.

Q You think your memory is clearer now than what it was six months ago?

A I think my memory is competent right now, yes.

Q So if you told Mr. Watson six months ago that there were drugs used at the party -- marijuana used at the party, that's wrong?

MR. ANTOINE: I object; those are facts not in evidence.

THE COURT: She indicated that she doesn't recall saying that.

MR. STROTHER:

Q Now Miss Tuman had some kind of inhalant substance at the party, correct?

A It was a small bottle.

Q That is what hit you in the lip, right?

A Yes, I believe it's room odorizer.

Q What do you call that stuff?

A I don't know.

Q Do you remember hearing the name Rush before?

A No.

Q You haven't heard that name before?

A I don't remember; I haven't been in any situation, I believe,

[testimony continues on next Appendix page]

[CROSS-EXAMINATION]
[Questioning by: Defense Atty. George B. Strother]
[Answers by: **State's Witness, Ms. Ruth Schultz, Complainant's friend**]

[Answer -continued from page 115]
where I've heard that name.

Q You don't remember telling Mr. Watson that Nina had a bottle of Rush at this party?
A No. I don't.
Q You don't recall that?
A No.
Q Your memory is better now than it was six months ago telling Mr. Watson?
A I feel competent that I'm not familiar with the term. And what hit me in the lip, I understand, was a room odorizer.
Q When you talked to Mr. Watson you tried to answer questions honestly, did you not?
A Yes.
Q This bottle that Miss Tuman tossed at you hit you in the lip?
A Yes, it did accidentally.
Q It hit you in the lip?
A Yes.
Q You should just answer the questions that I ask you, please. And you got a fat lip?
A My lip was hit for -- what is a fat lip?
[Q] Did your lip swell at all, Miss Schultz?
A No.
Q You didn't tell Mr. Watson that you got a fat lip from that incident?
A I think that --

[*pp. 117-126 omitted*]

[Statement of MR. STROTHER continued] Honor.

THE COURT: That's all, ma'am, thank you.

(Witness excused)

MR. ANTOINE: Your Honor, that's the last witness; I have no other witnesses for today's date. I would ask for a recess until tomorrow morning.

THE COURT: Members of the jury: It's difficult for a trial lawyer to determine in advance how long each of the witnesses is going to take on the witness stand. We had hoped that we would be able to go through to this afternoon until about 4:30, but it would appear that there are no other witnesses to call. So therefore we will have to adjourn until tomorrow morning at 9:00.

Please keep in mind the admonition that I gave you earlier regarding television or listening to the radio regarding the case. All right. Mr Bailiff.

(JURY was excused)

THE COURT: How are we doing time-wise?

MR. ANTOINE: My understanding is that I'm going to call Mr. Dale Murray who was not a witness to the offense; he was at the party but he was not a witness to the offense.

And then we have a petition from the State Crime Laboratory with the understanding that counsel has no objection to putting on the person that transported those

[statement continues on next Appendix page]

- [page 128] -

[Cont'd Statement of MR. ANTOINE to the Court]

exhibits from the police department to the crime laboratory and also the nurse and the doctor who actually removed the items from the victim.

THE COURT: If we started at 9:00, do you think that we will get that all in?

MR. ANTOINE: I think it would take no more than thirty to forty minutes total.

THE COURT: Mr. Strother, you have a motion which you brought on last week regarding a professor from the University. You indicated that he was leaving tomorrow noon or thereabouts to go to Canada. Will he be here to testify tomorrow morning?

MR. STROTHER: The only problem that I forsee, Judge, is that Mr. Antoine may understandably have an objection to the foundation for the testimony. I'm satisfied in my own mind that I can lay an adequate foundation, but there are time constraints and I may not be able to lay that foundation before I would need to have this person testify. I can make an offer of proof at this time and that would at least partially lay the foundation. That offer of proof is that I have spoken to a number of witnesses and what those witnesses will testify to is that --

MR. ANTOINE: I had some discussion concerning that. Unless he can establish through the record that there was this controlled substance or whether this was

[*remaining pages omitted*][

APPENDIX OO

[Here are set forth portions of the Document filed **Sept. 29, 1981 with the original trial court** - Dane County (State of Wisc.) Circuit Court, Branch 6 (Judge J.C. Boll) in re: State of Wisconsin v. O'Rear, Case # **80-CF-14 : AFFIDAVIT of G.S. Strother**, Trial Defense Attorney, Filed in re Postconviction Relief Attempt; Numbered below as document # **R-61**] [also filed as Exb 3 to *Coram* Petition, App. AA, *supra*]

[page 1]

STATE OF WISCONSIN — CIRCUIT COURT — BRANCH VI — DANE COUNTY

STATE OF WISCONSIN,
Plaintiff,
-vs-
TERRY J. O'REAR,
Defendant.

Case No. 80CF14

AFFIDAVIT

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

GEORGE B. STROTHER, being first duly sworn on oath deposes and says:

1) That he is an attorney licensed to practice law in the State of Wisconsin and that he was the attorney who represented the defendant, Terry J. O'Rear, at the trial and at sentencing herein.

2) That prior to trial on February 29, 1980, he filed with the court a Notice of Motion and Motion For Discovery and a Demand For Discovery and Inspection. That both of these documents requested the discovery and disclosure of exculpatory evidence or information which might lead to exculpatory evidence.

* * *

[page 2]

* * *

4) That in spite of the requests for discovery and disclosure of exculpatory evidence filed by the

defendant herein, your affiant was never informed of the following factual evidence:

a. That Nina Tuman had engaged in consentual sexual intercourse with an individual other than the defendant within 72 hours of the alleged rape.

b. The name of the individual described in subsection (a) above.

c. The fact that Nina Tuman had in her possession a bottle of "Rush" on the night in question, the physical characteristics of said bottle and its contents, and the place of its purchase.

d. That the hair samples obtained from the defendant, Terry J. O'Rear, were unsuitable for scientific analysis.

e. That the cigarette butt allegedly found at the scene of the alleged rape had been lost and would not be produced at trial.

5) That the defendant had been informed by the complaining witness, Nina Tuman, that she had sex with someone else the previous evening. At the time of this conversation, she did not disclose the individual's name.

6) With the exception of the one fact described in paragraph 5 above, all of the information listed in paragraph 4 above was in the exclusive control of District Attorney and unavailable to your affiant.

7) That by letter dated December 22, 1980, your affiant was provided with a list of the prosecutions witnesses. That a true and correct copy of said letter is attached hereto as Exhibit E.

[page 3]

* * *

10) That during its deliberations of January 8, 1981, the Jury by its foreman, G.B. Anderson, asked the following question, "In what form is the drug rush in . . .liquid, solid, gas?" Judge Boll gave the following response, "The testimony did not directly address that question."

[App. OO continues from last page]

Dated this 29th day of September, 1981.

[*Signed: George B. Strother*]
GEORGE B. STROTHER

* * *

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* * *

EXHIBIT E. *[Portions thereof]*

County of Dane
Office of the District Attorney
Madison, Wisconsin 53709

Criminal & General Division
210 Monona Avenue
City-County Building
608/266-4211

James E. Doyle, Jr.
District Attorney

December 22, 1980

Attorney Gard Strother
131 West Wilson Street
Madison, Wis. 53703

Re: State of Wisconsin v. Terry O'Rear

Dear Mr. Strother: * * *

[page 2]

Following are the witnesses I intend to call in the State's case in chief:

* * *

Susan Carney, R.N. - c/o Methodist Hospital, Madison, Wis.; * * *

Doctor S. Redman - c/o Methodist Hospital, Madison, Wis.

* * *

Very truly yours,

Donald L. Antoine
Assistant District Attorney

APPENDIX PP

[Here are set forth portions of the **Official Transcript of the Jury Trial in** [State of Wisconsin v. O'Rear, # **80-CF-14** before Dane County (State of Wisconsin) Circuit Court, Branch 6 (Judge J.C. Boll)] **Jan. 7, 1981, p.m.** [day 2]; No'd Below as document # **R-73**] [also filed as Exb 7 to *Coram* Petition, App. AA, *supra*] [Note: full text of selected page is presented]

- [page 29] -

[CROSS-EXAMINATION]

[Questioning by: Asst. Dist. Attorney, Donald Antoine] [Answers by: **Mr. Terry O'Rear, defendant**]

A That's right. I let Nina out later in front of the apartments.

Q When you were smoking in the car at the drive-in, what did you do with the cigarette butt?

A Excuse me.

Q What did you do with the cigarette butt when you were done smoking?

A The cigarette that I smoked, I was still smoking it, you know. I would have left it in the ash tray.

Q What kind of cigarettes did you have with you that night?

A That day?

Q Yeah.

A Okay. Three kinds. I had a cigar.

Q Uh-huh.

A That I smoked in Headliners. I believe I might have had the remnants of a package of Don Hill Red from the night before, and Drum roll-your-own tobacco, the remnants of a pouch of that.

Q And a fourth kind, a marijuana cigarette, correct?

A Did I say tobacco earlier or cigarette?

Q You said cigarette.

A Okay. Yeah.

Q What type of cigarette did you smoke when you stopped at the drive-in?

A A Drum that I had rolled myself.

APPENDIX QQ

[Here are set forth excerpts from the Document **filed November 16, 1981 with the original trial court** - Dane County (State of Wisc.) Circuit Court, Branch 6 (Judge J.C. Boll) on the same day as the Post-conviction Hearing held in re: State of Wisconsin v. O'Rear, Case # **80-CF-14** : **AFFIDAVIT of D.L. Antoine, Trial Prosecutor** Filed in Opposition to Postconviction Relief Attempt Numbered below as document # **R-67**] [also filed as Exb 4 to *Coram* Petition, App. AA, *supra*]

[page 1]

STATE OF WISCONSIN — CIRCUIT COURT — BRANCH 6 — DANE COUNTY

STATE OF WISCONSIN,
Plaintiff,

-vs-

TERRY J. O'REAR,
Defendant.

AFFIDAVIT

Case No. 80CF14

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

DONALD L. ANTOINE, being first duly sworn on oath deposes and says:

1) That he is an Assistant District Attorney for Dane County, Wisconsin, and that he was appointed by the Dane County District Attorneys Office in the prosecution of Terry J. O'Rear.

2) That is he aware of the discovery motions filed in the above entitled action, having reviewed the entire file in said case.

* * *

4) That the District Attorney's Office was not in possession of any facts pertaining to the sexual intercourse engaged in between Nina Tuman and an unspecified male individual prior to trial; and that

the District Attorney's Office did not become aware of said sexual intercourse until after the trial had commenced.

5) That the district Attorney's Office is unaware of the name of the individual described in the section above.

6) That the District Attorney's Office was unaware until the time of trial that there would be any testimony that Nina Tuman had used or consumed a substance called "rush". That the examination pertaining to said substance was prepared by the District Attorney's Office at the time of trial.

* * *

8) That the District Attorney's Office relied upon the Dane County Sheriff's Department to preserve all physical evidence and that the District Attorney's Office was unaware of the loss of the cigarette butt alluded to in the prosecution of Terry O'Rear until Willie Burt admitted its loss upon the witness stand.

* * *

[page 2]

* * *

11) That the defense in the above entitled action at no time made any request to have the closing argument and rebuttal transcribed.

DATED this 16th day of November, 1981.

[*signed: Donald L. Antoine*]
Donald L. Antoine

Subscribed and sworn to before me
this 16th day of November, 1981.

[*signature of Susan J. Roberts*]
Notary Public
My commission is permanent

APPENDIX RR

[Here is set forth the Document filed **October 23, 1989 with the original trial court** - Dane County (State of Wisc.) Circuit Court, Branch 6 (Judge J.C. Boll) as Exhibit 33 to Petitioner's Petition for Writ of Error Coram Nobis (i.e., App. AA; *supra*]: **Affidavit of Richard L. Cates - Petitioner's Supervising Appellate Counsel** in 1981-83

[page 1]

STATE OF WISCONSIN — CIRCUIT COURT — DANE COUNTY

TERRY J. O'REAR,
Petitioner
-vs-
STATE OF WISCONSIN,
Respondent.

Case No. [89CV5909]

AFFIDAVIT OF RICHARD L. CATES

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Richard L. Cates, being first duly sworn, on oath deposes and says:

1. Affiant is an attorney licensed to practice law in Wisconsin, is a shareholder at Lawton & Cates, S.C., and is one of the attorneys who represented the petitioner during his postconviction motion proceedings and his appeal of Case No. 80-CF-14, State of Wisconsin v. Terry J. O'Rear, to the Wisconsin Court of Appeals.

2. A key issue during said proceedings concerned the admission into evidence, and the prejudicial and harmful consequences that occurred as a result thereof, of testimony by State witnesses about a "hand-rolled" cigarette butt allegedly found

by Officer Mary Jo O'Donohue at the parking lot of the Speedway Bar, which is the location where the State alleges the petitioner sexually assaulted the complainant, Nina Tuman.

3. Throughout affiant's representation of the petitioner, affiant relied on representations made by various State witnesses who testified at trial, and those made by Assistant District Attorney Donald L. Antoine at trial and by Affidavit subsequent to trial, that the State had lost the alleged "hand-rolled" cigarette butt. (See the Affidavit of Assistant District Attorney Donald L. Antoine attached as Exhibit A). [Note: attached to today's Petition for Cert. as App. QQ. pp. 214-5 *supra*]

4. While affiant was representing the petitioner at the postconviction motion proceedings and on appeal to the Wisconsin Court of Appeals, affiant considered it unnecessary to go to the evidence room, or to conduct any other investigation about the alleged "hand-rolled" cigarette butt, because affiant relied on the various State representations that said cigarette butt was lost. Since said evidence was reportedly lost, it would not be available for self inspection or for scientific analysis, and it would therefore be futile to conduct any further investigation.

[page 2]

5. Because affiant relied on said representations, affiant's position at the postconviction motion proceedings and on appeal to the Wisconsin Court of Appeals was substantially affected, to the detriment of the petitioner, particularly because affiant had to utilize the legal standard applicable to lost evidence rather than the much more strict legal standard applicable to destroyed evidence.

6. On or about early May 1988, the petitioner consulted affiant, still asserting innocence, and asked about the possibility of conducting DNA or other scientific analysis on any evidence that may

still remain in the evidence room to conclusively determine that the petitioner did not commit the alleged crime.

7. Thereafter, affiant conferred with Attorney H. Arleen Wolek, who was then a law clerk, concerning legal research of this matter.

8. Thereafter, affiant and Ms. Wolek conferred with Edward G. Grosse, an investigator for Lawton & Cates, S.C., and asked Mr. Grosse to conduct an investigation to determine if any evidence still remained in the evidence room of the Dane County Sheriff's Department or the Wisconsin State Crime Laboratory on which to conduct DNA or other scientific analysis, or to determine if any other relevant information pursuant to Case No. 80-CF-14 still existed.

9. Affiant did not learn until on or about May 10, 1988, after Mr. Grosse conducted an investigation, that the alleged "hand-rolled" cigarette butt, which was the key issue on appeal, had actually been destroyed by the State more than four (4) months before trial, contrary to the State's representations at trial and thereafter that said "evidence" was lost.

[Signed: Richard L. Cates]
Richard L. Cates

Subscribed and sworn to before me
this 16th day of October, 1989.

[Signature of H. Arleen Wolek]
Notary Public, State of Wisconsin.
My commission is permanent.

APPENDIX SS

[Here is set forth the Document filed **October 23, 1989 with the original trial court** - Dane County (State of Wisc.) Circuit Court, Branch 6 (Judge J.C. Boll) as Exhibit 34 to Petitioner's Petition for Writ of Error Coram Nobis (i.e., App. AA; *supra*]:
Affidavit of James W. Gardner - Petitioner's Appellate Counsel in 1981-83

[page 1]

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

TERRY J. O'REAR,
Petitioner

-vs- Case No. [89CV5909]

STATE OF WISCONSIN,
Respondent.

AFFIDAVIT OF JAMES W. GARDNER

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

James W. Gardner, being first duly sworn, on oath deposes and says:

1. Affiant is an attorney licensed to practice law in Wisconsin, is a shareholder at Lawton & Cates, S.C., and is one of the attorneys who represented the petitioner during his postconviction motion proceedings and his appeal of Case No. 80-CF-14, State of Wisconsin v. Terry J. O'Rear, to the Wisconsin Court of Appeals.

2. A key issue during said proceedings concerned the admission into evidence, and the prejudicial and harmful consequences that occurred

as a result thereof, of testimony by State witnesses about a "hand-rolled" cigarette butt allegedly found by Officer Mary Jo O'Donohue at the parking lot of the Speedway Bar, which is the location where the State alleges the petitioner sexually assaulted the complainant, Nina Tuman.

3. Throughout affiant's representation of the petitioner, affiant relied on representations made by various State witnesses who testified at trial, and those made by Assistant District Attorney Donald L. Antoine at trial and by Affidavit subsequent to trial, that the State had lost the alleged "hand-rolled" cigarette butt. (See the Affidavit of Assistant District Attorney Donald L. Antoine attached as Exhibit A). [Note: attached to today's Petition for Cert. as App. QQ. pp. 214-5 *supra*]

4. While affiant was representing the petitioner at the postconviction motion proceedings and on appeal to the Wisconsin Court of Appeals, affiant considered it unnecessary to go to the Dane County Sheriff's Department evidence room, or to conduct any other investigation about the alleged "hand-rolled" cigarette butt, because affiant relied on the various State representations

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[page 2]

that said cigarette butt was lost. Since said evidence was reportedly lost, it would not be available for self inspection or for scientific analysis, and it would therefore be futile to conduct any further investigation.

5. Because affiant relied on said representations, affiant's position at the postconviction motion proceedings and on appeal to the Wisconsin Court of Appeals was substantially affected, to the detriment of the petitioner, particularly because affiant had to utilize the legal standard applicable to lost evidence rather than the much more strict legal standard applicable to destroyed evidence.

6. Affiant did not learn until on or about May 10, 1988, after Mr. Edward G. Grosse, an investigator for Lawton & Cates, S.C., conducted an investigation at the request of Attorneys Richard L. Cates and H. Arleen Wolek, that the alleged "hand-rolled" cigarette butt, which was the key issue on appeal, had actually been destroyed by the State more than four (4) months before trial, contrary to the State's representations at trial and thereafter that said "evidence" was lost.

[Signed: James W. Gardner]
James W. Gardner

Subscribed and sworn to before me
this 16th day of October, 1989.

[Signature of H. Arleen Wolek]
Notary Public, State of Wisconsin.
My commission is permanent.

APPENDIX TT

[Here are set forth portions of the "Statement of the Case" presented to the Federal District Court for the W.D. of Wisc. on 12-31-86 as part of petitioner's Section 2254 "habeas brief," there below enumerated as document number 1a. at pp. 1-5; these same pages were presented to This Court on Jan. 9, 1988 as Appendix G (pp. 30a & 45-53a) to his prior petition for a writ of certiorari to the US 7th Cir. Ct.] [Presented again here to establish that there was no lack of diligence in attempting to pursue Petitioner's case previously before the federal court system]

[page 1]

* * *

Facts Regarding Mr. O'Rear and this Habeas Action

[Covering the period from his release from prison to his submission of his habeas petition to the Federal District Court for the W.D. of Wisconsin,on 12-31-86]

[page 2 - line 6]

After 24 months in the state prison system, Mr. O'Rear was granted an earned early parole by the Wisconsin State Parole Board due to his good behavior and was turned over to the State parole authorities in Madison on May 26, 1983. Following his release from prison, Mr. O'Rear was constantly employed, at times having three separate employers and working over 70 hours a week. Throughout this period he economically maintained himself, repaid his substantial past educational and legal financial obligations, and, whenever he found time, conducted his own research into the law as related to his case so as to develop an effective habeas presentation. Being employed he could not claim poverty so as to request free legal representation, but at the same time, given his past debts and low wages, he also could not afford to hire a private attorney at their

current rates; thus, Mr. O'Rear turned to the only remaining alternative--that of studying the law and researching the issues personally so as to represent himself. Admittedly this process was tortuous, arduous, time consuming and slow-paced. Finally, by early August, 1985 the final draft of the proposed brief was completed.

Following the drafting of the brief then to be presented to this Court (Found below in Facts sub. 2, and in the expanded upon Heading III-Petition in Re: O'Rear v. Wisconsin), on August 14, 1985 Mr O'Rear, acting as his own attorney, obtained the necessary formal papers in order to file a habeas action

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[- page 3-]

from the offices of this Court in downtown Madison. As soon as scheduling would allow thereafter, at 3:00 p.m. on August 20, 1985, Mr. O'Rear met with the pro se law clerk for the Western Federal District Court for Wisconsin (Ms. Hollar) for approximately 45 minutes in order to discuss the proper methods of filing the recently obtained aforementioned materials and the ways to interface them with the brief already drafted. Two days later, while in the process of finalizing and formalizing his habeas petition, but prior to actually filing it with this Court, Mr. O'Rear went to his regular tri-monthly meeting with his Wisconsin State parole officer (Ms. Jaeger) at 3:30 p.m., August 22, 1985. Shortly after his arrival Mr. O'Rear was surprisingly handed a document granting him an unscheduled early discharge from the sentence of conviction which was to have continued until January 8th, 1987. (See Exhibit A attached to today's Brief). Mr. O'Rear was informed that the discharge was due to his above-average and excellent behavior while on parole. Upon examination of said document, Mr. O'Rear discovered that it had been dated on August 7, 1985 and signed by the Director of Wisconsin's Division of Corrections on August 9, 1985 (See today's Exhibit B attached hereto). Mr. O'Rear had not petitioned or

requested such a discharge from the State of Wisconsin. He also was unaware that he would be handed this document at his regularly scheduled meeting with his parole officer on August 22. And, in this manner he only became aware that he was discharged by the State of Wisconsin some 15 days after the discharge document was drafted and 13 days after it was signed. Also upon receiving this document Mr. O'Rear realized it would be impossible to formally file his habeas materials prior to the receipt of the back-dated discharge document. He further realized that at best the date that he met with the pro se law clerk and/or the date that he obtained the necessary materials to file his petition would have to be viewed by this Court as EQUIVALENT to formal filing some 2-8

[- page 4 -]

days prior to the actual receipt of the discharge document, with the Court also viewing the receipt of the discharge document as the date of Mr. O'Rear's actual discharge rather than either of the two dates found on the face of said document. While praying that the Court would view the situation equivalently, Mr. O'Rear likewise realized to blindly assume that the Court actually would do so would be another matter. And, given the formal world of judicial logic and decision-making, he felt it an absolute necessity to present formal written arguments to this Court stating why the Court should not dismiss Mr. O'Rear's habeas petition outright. Therefore, in a sincere and desperate attempt to prevent a final kafkaesque 'fait accompli' from dashing habeas relief and justice, Mr. O'Rear set out to research the matter and develop an argument which would best present his case to this Court.

Said research has admittedly been time consuming and extensively complicated, particularly for the non-lawyer Mr. O'Rear who has had to continue to earn his subsistence at the same time. The argument presented under section II below is the result

of said research. In the process of such research on section II, Mr. O'Rear also ran across certain materials which he has incorporated into the Brief that was in its final draft state in early August 1985 thereby producing today's section III. The sole reason for the delay since August 22, 1985 was the study and research necessary to best present this material to this Court. Had Mr. O'Rear not been unexpectedly given the early discharge document on August 22, 1985 these additional arguments and their related research would not have been necessary, and the earlier non-expanded petition, which was already in its final form, would have been presented to this Court in early September 1985, prior to any subsequent discharge and to the scheduled termination date of January 8, 1987. Conversely, given that Mr. O'Rear was completely unaware of the actions being taken by the Wisconsin

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[- page 5 -]

Division of Corrections in August, 1985 regarding himself, and given that the action that occurred on August 22 was completely unforeseen, Mr. O'Rear felt no special need to rush the filing of his habeas petition prior to August 22, 1985. For had he known of what was to happen on August 7, 9, and 22, 1985 in advance of their occurrence, the completion of his habeas would have been speeded and actually filed prior to these events, which would have made the arguments on the issue of standing needless and, at the same time, made the additional delay since August 22, 1985 unnecessary.

* * *

APPENDIX UU

[Here are set forth a **list of the allegations of error** in the State conviction below as discussed in Petitioner's Section 2254 habeas documents **presented to the Federal District** Court for the W. D. of Wisconsin on 12-31-86 (documents therebelow numbered as 1 and 1a) and as listed for This Court on Jan. 9, 1988, as Appendix J, at pp. 62a & 65a to Petitioner's prior petition for a writ of certiorari to the US 7th Cir.] [Presented again here **to establish that Petitioner was basing his previous federal merit claim** (that was never allowed to be presented due to the decision that petitioner had no standing to proceed), in part, **on the Respondent's false claims that the cigarette butt (link to the crime scene) was lost when, in truth, it was destroyed; and, Respondent failed to inform Petitioner or the Federal Courts of this.**]

[1988 doc. page 62a]

Despite requests for discovery and exculpatory material made by Mr. O'Rear's trial defense attorney, the prosecution failed to disclose the following factual information:

* * *

[1988 doc. page 63a - emphasis added]

* * *

f) That the **cigarette butt allegedly found at the scene of the alleged rape had been lost and would not be produced at trial.**

At trial the following events occurred which, in addition to the prosecution's failure to constitutionally disclose the existence of the above noted exculpatory material, the defendant upon his State appeal alleged as constitutional error:

* * *

2) The State policewoman witness was allowed to testify as to finding a cigarette butt before

the lay jury as being a 'handrolled' one when no one

[1988 doc. page 64a - emphasis added]

other than that policewoman had seen or examined said butt and the butt itself was never introduced into evidence having been **lost by the police without explanation** (it was established at the trial subsequent to the policewoman's testimony that Mr. O'Rear on occasion handrolled cigarettes).

* * *

[1988 doc. page 65a - emphasis added]

* * *

Refinement of the above allegations of error into whether-type questions formed the basis of the Petitioner's Section 2254 habeas petition of 12-31-86 presented to the Federal District Court for the Western District of Wisconsin and, in the supporting brief submitted with said petition (numbered there below as document no. 1a), notation was made to the most relevant Federal case law.

I) **Whether the admission of testimony concerning certain physical evidence which had been lost by the State violated Your Petitioner's right to due process?** (in light of U.S. v. Augenblick, 393 U.S. 348 (1969), U.S v. Bryant, 439 F.2d 642 (D.C. 1971), U.S. v. Loud Hawk, 627 F.2d 1139 (9th Cir. 1979); & U.S. v. Pollock, 417 F. Supp. 1332 (D.C. MA 1976).)

* * *

APPENDIX VV

[Here is set forth the Document filed **October 23, 1989 with the original trial court** - Dane County (State of Wisc.) Circuit Court, Branch 6 (Judge J.C. Boll) as Exhibit 31 to Petitioner's Petition for Writ of Error Coram Nobis (i.e., App. AA; *supra*): **Affidavit of Edward G. Grosse - Private Investigator who discovered that evidence was destroyed]**

[page 1]

STATE OF WISCONSIN — CIRCUIT COURT — DANE COUNTY

TERRY J. O'REAR,
Petitioner
-vs-
STATE OF WISCONSIN,
Respondent.

Case No. [89CV5909]

AFFIDAVIT OF EDWARD G. GROSSE

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Edward G. Grosse, being first duly sworn, on oath deposes and says:

1. He is an investigator employed by the law firm of Lawton & Cates, S.C., the attorneys representing the petitioner in the above-entitled action.

2. He was asked by Attorneys Richard L. Cates and H. Arleen Wolek to conduct an investigation pursuant to any information he could obtain concerning the State's prosecution in Case No. 80-CF-14, State of Wisconsin v. Terry J. O'Rear, and specifically to determine if any evidence from said case was still available on which to conduct DNA or other scientific testing.

3. On or about May 10, 1988, he conducted

said investigation at the Dane County Sheriff's Department and at the State of Wisconsin Crime Laboratory and determined that there was no evidence still remaining in the evidence rooms.

4. During the investigation conducted on May 10, 1988, however, he discovered four (4) tags corresponding to four (4) different items of "evidence" that had been placed in the evidence room at the Dane County Sheriff's Department pursuant to Case No. 80-CF-14.

5. One (1) of the four (4) tags corresponding to such evidence was tag number 34420 on which the following was recorded:

a) It corresponded to a "hand-rolled" cigarette butt.

b) The "hand-rolled" cigarette butt was destroyed on August 21, 1980.

c) The authority for this destruction came from a Department employee whose initials are D.L.

[page 2]

No date was marked on tag number 34420 to indicate when the "hand-rolled" cigarette butt was placed in the evidence room.

6. One (1) of the four (4) tags corresponding to such evidence was tag number 33574 on which the following was recorded:

a) It corresponded to a pair of blue socks that belonged to the complainant, Nina Tuman.

b) The socks were put into the evidence room on January 2, 1980

c) The socks were destroyed on August 21, 1980, the same date on which the alleged "hand-rolled" cigarette butt was destroyed.

d) The authority for this destruction came from a Department employee whose initials are D.L.

7. Subsequent to May 10, 1988, he learned

that the initials D.L. stand for Lieutenant Darrell Lien, who was the property or evidence officer at the Dane County Sheriff's Department in August 1980 when the alleged "hand-rolled" cigarette butt and the socks were destroyed.

8. On May 16, 1988, he spoke with Lt. Darrell Lien, who told him the following:

a) As property or evidence officer, Lt. Lien did not customarily make the decision to dispose of items contained in the evidence room.

b) The only reason an item, such as the alleged "hand-rolled" cigarette butt, would have been destroyed prior to trial was because someone decided that it either had no value as a piece of evidence in the case or that it would not be used as evidence in the case.

c) His initials were on the tag because he is the person who actually destroyed the evidence.

[*Signed: Eduard G. Grosse*]
Edward G. Grosse

Subscribed and sworn to before me
this 17th day of October, 1989.

[Signature of H. Arleen Wolek]
Notary Public, State of Wisconsin.
My commission is permanent.

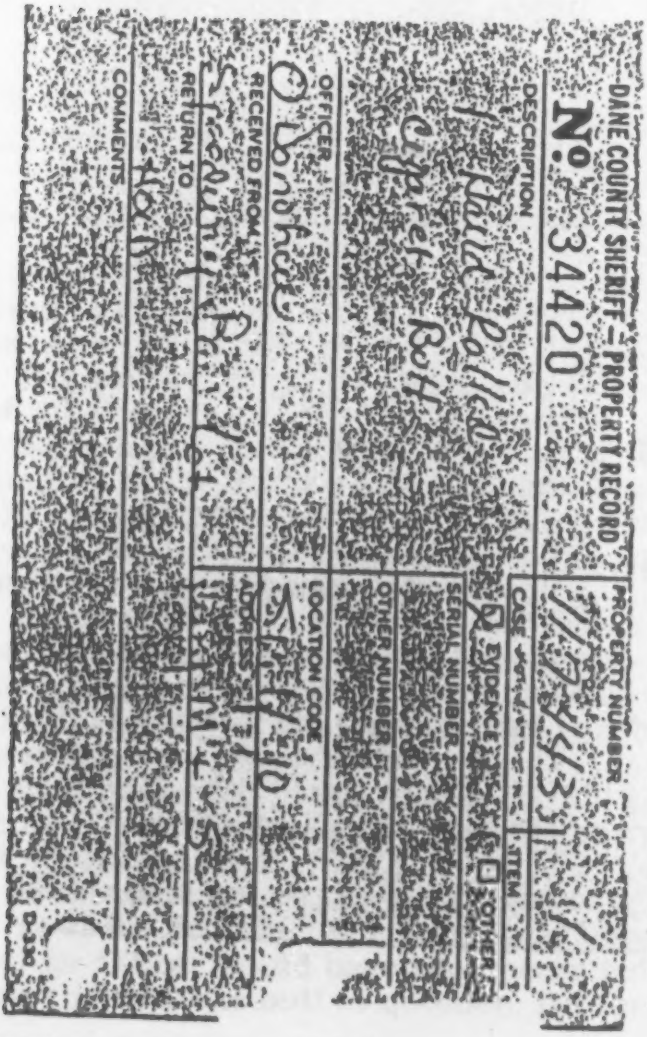
APPENDIX WW

[Here is set forth the Document filed **October 23, 1989 with the original trial court** - Dane County (State of Wisc.) Circuit Court, Branch 6 (Judge J.C. Boll) as Exhibit 32 to Petitioner's Petition for Writ of Error Coram Nobis (i.e., App. AA; *supra*):

Non-reduced/exact size PHOTOCOPY of Official Dane County Sheriff's PROPERTY EVIDENCE TAG

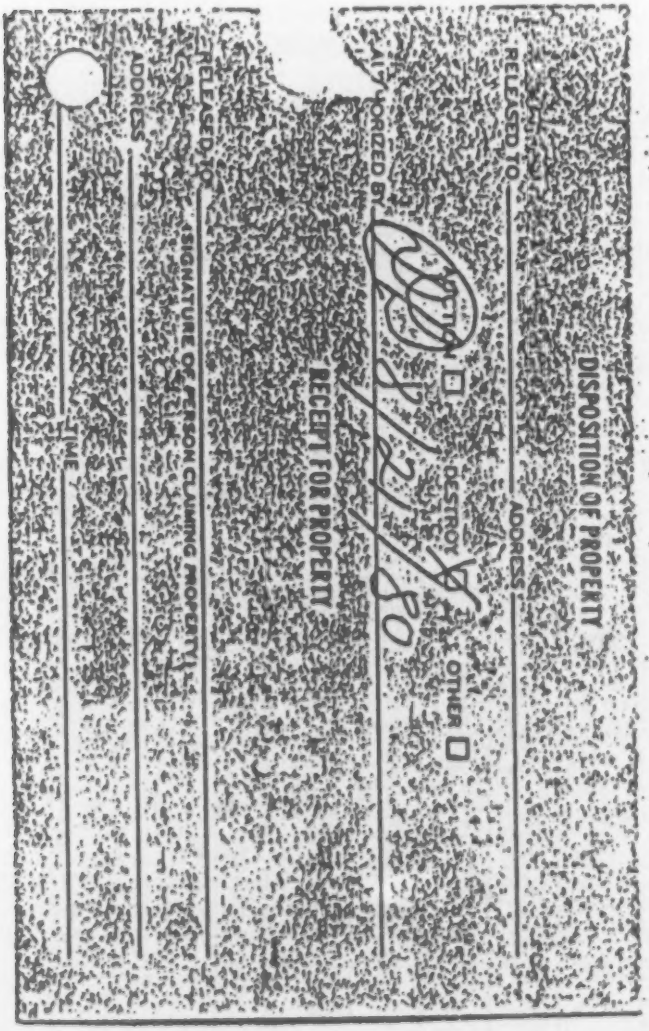
Marked "Destroy - 8/21/80"

FRONT SIDE OF PROPERTY TAG:



Non-reduced/exact size
PHOTOCOPY OF PROPERTY EVIDENCE TAG
Marked "Destroy - 8/21/80"

REVERSE SIDE OF PROPERTY TAG:



APPENDIX XX

[Here is set forth the Document **filed January 21, 1989** with Dane County (State of Wisc.) Circuit Court, Branch 6 (Judge J.C. Boll) **by Respondent** in Response and Opposition to Petitioner's Petition for Writ of Error Coram Nobis (i.e., App. AA; *supra*):

[page 1]

STATE OF WISCONSIN — CIRCUIT COURT — BRANCH 6 — DANE COUNTY

TERRY O'REAR,
Petitioner
-vs.-
STATE OF WISCONSIN,
Respondent.

89 CV 5909

RETURN TO PETITION FOR WRIT OF ERROR CORAM NOBIS

Respondent, State of Wisconsin, by its attorney, C. William Foust, responds to the Petition in this action as follows:

1) Respondent admits the allegation of paragraph one of the Petition.

2) Respondent denies the allegations of paragraph 2 of the Petition and affirmatively states that the testimony of Nina Tuman conclusively and positively established that O'Rear sexually assaulted her, as borne out by the jury's verdict.

3) Respondent lacks sufficient information to form a belief about the accuracy of paragraph 3 of the Petition. Respondent believes that conjecture regarding the basis of the jury's verdict is irrelevant in this action.

4) With respect to paragraphs 4-18, 20, 22-27 of the Petition. Respondent states that the court record speaks for itself.

5) Respondent denies the allegations of paragraph 19 of the Petition and affirmatively states that counsel for O'Rear would have been permitted to examine the cigarette butt in question, had he asked.

6) Respondent denies the allegation of paragraph 21 of the Petition that O'Rear was convicted on questionable evidence.
7) Respondent lacks information sufficient to form a belief as to the accuracy of the assertions of paragraphs 28-51 of the Petition.
8) Respondent denies the assertions and arguments of paragraphs 52-62 of the Petition and affirmatively states that the cigarette butt in question was inadvertently disposed of in the course of a general cleaning of the Dane County Sheriff's evidence storage area on or about August 2, 1980, without prior notice to or permission from the assistant district attorney assigned to the case.
9) Respondent lacks information sufficient to form a belief as to the accuracy of the assertion in paragraph 63-64 of the Petition.
10) Respondent admits paragraph 65 of the Petition.
11) Respondent denies paragraph 66 of the Petition.

WHEREFORE, Respondent demands judgment dismissing the Petition and awarding Respondent its costs and whatever other relief might be appropriate.

Dated at Madison, Wisconsin, this 21 day of January, 1990.

[*Signed C. William Foust*]
C. William Foust
District Attorney
Dane County, Wisconsin
Attorney for Respondent

APPENDIX YY

[Here is set forth the Document **filed January 21, 1989** with Dane County (State of Wisc.) Circuit Court, Branch 6 (Judge J.C. Boll) **by Respondent** in Response and Opposition to Petitioner's Petition for Writ of Error Coram Nobis (i.e., App. AA; *supra*):

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 6 | DANE COUNTY

TERRY J. O'REAR,
Petitioner
-vs.- 89 CV 5909
STATE OF WISCONSIN,
Respondent.

NOTICE OF MOTION AND MOTION TO QUASH

Notice To: H. Arlene Wolek, Attorney for Petitioner
Lawton & Cates; 214 W. Mifflin Street
Madison, Wisconsin 53703

Notice is hereby given that the following Motion will be heard at a time and place to be set by the Court.

MOTION TO QUASH

Respondent, State of Wisconsin, by its counsel, C. William Foust, moves the Court for the entry of an Order quashing the Petition and any subsequent orders in this action for the following reasons:

1) Coram Nobis does not reach the question of a misrepresentation of fact. Houston v. State, 7 Wis. 2d 348, 352, ___ N.W.2d ___ (1985).

2) The error complained of is not outside the record and Coram Nobis reaches only errors of fact outside the record. State v. Kanieski, 30 Wis. 2d 573, 576, ___ N.W.2d ___ (1965).

3) The error complained of would not have prevented the entry of judgment. id.

Dated at Madison, Wisconsin, this 21 day of January, 1990. [*Signed C. William Foust*]
C. William Foust; District Attorney
Dane County, Wisconsin
Attorney for Respondent

APPENDIX ZZ

[Here is set forth the Document filed **Jan. 28, 1990 with the original trial court** - Dane County (State of Wisc.) Circuit Court, Branch 6 (Judge J.C. Boll) in response to his unexpected announcement of resignation from the bench **requesting an expedited hearing** on Petitioner's Petition for Writ of Error Coram Nobis (i.e., App. AA; *supra*):

[page 1]

STATE OF WISCONSIN — CIRCUIT COURT — BRANCH 6 — DANE COUNTY

TERRY J. O'REAR,
Petitioner
-vs-
STATE OF WISCONSIN,
Respondent.

Case No. 89 CV 5909

NOTICE OF MOTION AND MOTION FOR EXPEDITED HEARING

Notice to: C. William Foust
District Attorney
210 Martin Luther King, Jr. Blvd.
Madison, Wisconsin 53709

Notice is hereby given that the following Motion will be heard at a time and place to be set by the Court.

MOTION FOR EXPEDITED HEARING

Petitioner, Terry J. O'Rear, by his attorneys, Lawton & Cates, S.C., by John H. Bowers and H. Arleen Wolek, moves the Court for a hearing on all of the pending issues pursuant to the above-captioned matter, as soon as is practicable, for the following reasons:

1. The Honorable James C. Boll presided over the criminal proceedings that underlie this action.

2. Wherever possible, the judge who presided at trial should be the same judge who decides whether to issue a Writ of Error Coram Nobis and whether to grant relief to the petitioner pursuant to said Writ. Ernst v. State, 181 Wis. 155, 193 N.W. 978 (1923).

[page 2]

3. On December 14, 1989 a scheduling conference was held pursuant to this action. At said conference, the respondent was given thirty (30) days from the date of the Order granting a Writ of Error Coram Nobis to respond to said Writ. Thirty (30) days were given the respondent, rather than the twenty (20) days requested by District Attorney C. William Foust, so that the respondent would have adequate time to brief all of the issues raised in the petition and brief filed by the petitioner on October 23, 1989.

4. The Honorable James C. Boll issued a Writ of Error Coram Nobis to the petitioner on December 20, 1989 but he has not yet ruled upon the relief to be granted to the petitioner.

5. The respondent filed a Return to the Petition for a Writ of Error Coram Nobis and a Motion to Quash said Writ on January 22, 1990 but did not brief the issues; and therefore, has waived its right to brief any of the issues, or to provide the Court with any other material(s), pursuant to said matter.

6. All of the materials necessary for the Honorable James C. Boll to rule on this matter are now before the Court.

7. On January 26, 1990, the Honorable James C. Boll announced his plans to resign from his position as the presiding judge of Dane County Circuit Court Branch 6. The effective date of said resignation is imminent.

8. To comply with common law principles in accordance with Ernst v. State as mentioned in paragraph two (2) above, it is crucial that a hearing pursuant to all of the issues in the

above-captioned matter be scheduled and that an Order pursuant to said issues be rendered prior to the effective date of the resignation of the Honorable James C. Boll.

9. If there is no hearing pursuant to this matter and no Order rendered prior to the effective date of the resignation of the Honorable James C. Boll, this matter will have to be assigned to another judge. In that event, it will be quite time consuming for another judge to become familiar with this Coram Nobis proceeding with the criminal proceedings that underlie it. The petitioner has already suffered substantially for the State's misrepresentation of the only objective evidence the State allegedly possessed, which was the only evidence that supposedly placed Mr. O'Rear at the scene of the alleged crime. It would be a grave injustice for there to be any further delay in providing relief to the petitioner.

Dated this 29th day of January, 1990.

LAWTON & CATES, S.C.

BY: *[signed: H. Arleen Wolek]*
John H. Bowers
H. Arleen Wolek

214 W. Mifflin Street
Madison, Wisconsin 53703-2594
(608) 256-9031

APPENDIX AAA

[Here is set forth portions of the Document filed **Jan. 31, 1990 with the original trial court** - Dane County (State of Wisc.) Circuit Court, Branch 6 (Judge J.C. Boll) in response to his unexpected announcement of resignation from the bench **Respondent's agreement** with Petitioner's **request for an expedited hearing** (i.e., made in App ZZ; *supra*]

DANE COUNTY
DISTRICT ATTORNEY'S OFFICE
C. William Foust
District Attorney

January 31, 1990

The Honorable James C. Boll
Dane County Circuit Court, Branch 6
City-County Building
Madison, Wisconsin 53709

RE: Terry O'Rear v. State of Wisconsin
Case No. 89 CV 5909

Dear Judge Boll:

I am in agreement with the Petitioner's request for an expedited meeting. I, too, think that it makes the most sense for you to decide this case.

I write to inform you that I will be unavailable during the week of February 12 and, most likely, the week of February 19. * * *

Sincerely yours,

[*signed: C. William Foust*]
C. William Foust
District Attorney

CWF:lmr
cc: H. Arleen Wolek

APPENDIX BBB

[Here is set forth portions of the document **filed Dec. 12, 1990 with the replacement judge and entered into evidence as Exhibit 1 at the Oral Argument Hearing** held that day in Dane County (State of Wisc.) Circuit Court, Branch 2 (Judge M.B. Torphy) in re **Case No. 89-CV-5909**; Also presented as App. 146-147 to Petitioner's appellate brief [App.GG] to the Wis App Ct. on June 21, 1991 in case no. 91-0832]

DANE COUNTY DISTRICT ATTORNEY'S OFFICE
C. William Foust District Attorney

December 6, 1990

Attorney H. Arlene Wolek
Lawton & Cates
214 West Mifflin Street
Madison, Wisconsin 53703-2594

Re: O'Rear v. State
Case No.[89] CV 5909

Dear Ms. Wolek:

I write pursuant to our agreement of December 5, 1990. You indicated that your public records request was prompted by a desire to examine records relating to the destruction (your term) of the hand-rolled cigarette butt in Mr. O'Rear's case. I indicated I was willing to search the file for records relating to the cigarette butt and would provide them to you, but I was unwilling to simply turn my entire file over to you.

* * * [page 2]

As best I can determine, Antoine first learned that the cigarette butt was not to be found shortly before Deputy O'Donohue testified. She apparently arrived in his office and he inquired as to the physical evidence. She said that she had not gotten it. Antoine recalls sending someone down to get the cigarette butt. Antoine's recollection is that he was told that it could not be found. * * *

Sincerely yours,
C. William Foust
District Attorney

APPENDIX CCC

[Here is set forth excerpts from the **Official Transcript of Motion Hearing held in re Coram Nobis Petition** before (replacement judge) **Judge Michael Torphy,** Dane County Circuit Court, Branch 2, in **O'Rear v. State of Wisconsin, # 89-CV-5909**]

[Note: full text of each selected page is presented]

- [page] 25 -

[continued ORAL STATEMENT by THE COURT [Judge Torphy] to Defense-Petitioning Atty. Wolek]: and if you're not, why, that's fine, but you can't tell me you are and then tell me but we might be able to get something else later. Are you ready or aren't you?

MR. FOUST [the District Attorney]: I see the factual record for the motion to quash as being the petition.

THE COURT: Yeah.

MR. FOUST: And that record is not going to change by what they might learn in discovery.

THE COURT: I think that it's not inappropriate for a variety of reasons, one, whether you're in the right forum to compel under open records to divulge his entire file. It might be simpler that way, but I think that he makes a reasonable point of the correct remedy under Chapter 19 is mandamus to force him to. It's not a motion to compel him to respond to what amounts to discovery in the context of this case.

Additionally, you say Mr. Foust's motion to quash is based on the petition. It is in fact. The motion to quash is in fact a response to a petition. It's not a response or a presentation into an evidentiary record. I think that it is not inappropriate that I have you deal with the motion to quash, I'll hear argument on that, and then we will proceed.

You see, if I grant the motion to quash, then that's the end of the case, at least as far as I'm concerned.

[statement continues on next Appendix page]

[O'Rear v. State of Wisconsin, # 89-CV-5909
Transcript - **Dec. 5, 1990**
{**Motion Hearing re Coram Nobis Petition**}
held before **Judge** Michael **Torphy**,
Dane County Circuit Court, Branch 2]

- [page] 26 -

[continued ORAL STATEMENT BY THE COURT {Judge Torphy} to Defense-Petitioning Atty. Wolek]:

It may not be with respect to further actions in further courts, and judging from the history of this case, its going somewhere beyond here, and I don't say that derogatorily. That's what's going to happen. Because Mr. O'Rear has a deep and abiding interest in voiding those proceedings, and I understand that, and I have no quarrel with it. But my point is that if I grant the motion to quash, the petition is done with as far as I'm concerned, and there's no reason why I should deal with and no purpose for me to deal with either the subject of whether you're in the right forum with respect to your open records law or whether there's further evidence for whatever because there is no further whatever. It's all done with.

So it's just for me and for you people. It seems to me that there's a time economy involved that says and tells me hear the motion to quash, decide it. If it is decided in mover's favor, Mr. Foust's favor, that's the end of the case. There is no motion to compel. There's nothing. It's done with unless on appeal I'm reversed on that. If in fact I decide against Mr. Foust on the motion to quash, that's the time for me to get involved in what you want with regard to further evidence.

I think it might be appropriate, however, for you really to consider the point that Mr. Foust makes, and

[remaining pages omitted]